TRANSCRIPT OF THE RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917

No. 317

WILLIAM SHEPARD, CHARLES McLEISH, STEPHEN McLEISH, AND JOSEPH BURR, APPELLANTS

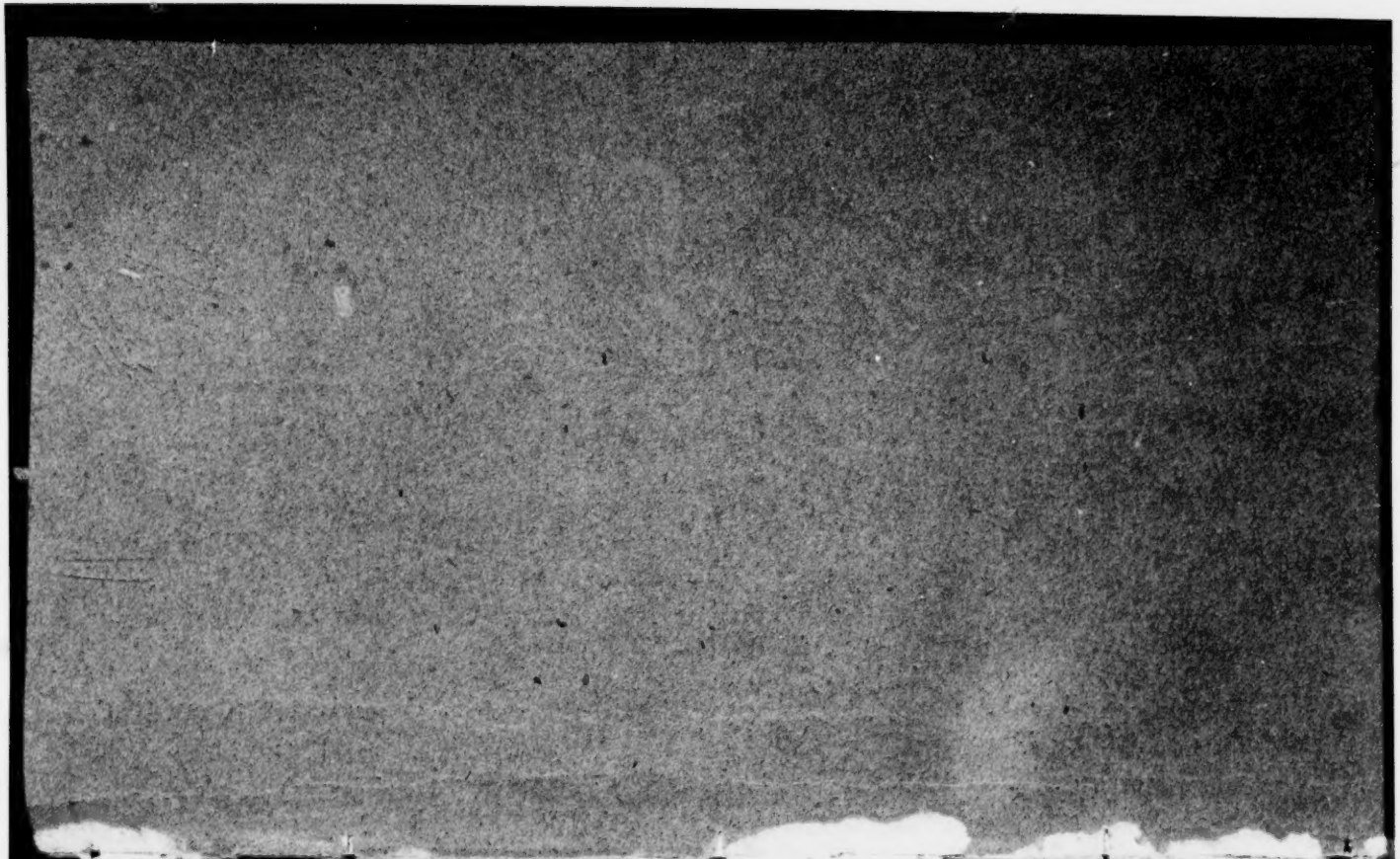
vs.

C. R. D. BARRETT, TREASURER OF FRANKLIN COUNTY, OHIO

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

FILED SEPTEMBER 10, 1917

(18,638.)



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(18,833.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903.

No. 217.

WILLIAM SHEPARD, CHARLES McLEISH, THOMAS McLEISH, AND JOSEPH BUSH, APPELLANTS,

vs.

O. E. D. BARRON, TREASURER OF FRANKLIN COUNTY, OHIO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

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1 & 2 *Transcript of Record, Case No.* 924.

At a stated term of the circuit court of the United States of America, within and for the eastern division of the southern district of Ohio, in the sixth judicial circuit of the United States of America, begun and had in the court rooms at the city of Columbus, Ohio, in said district, on the first Tuesday of December being the fourth day of that month, in the year of our Lord one thousand nine hundred, and of the American Independence the one hundred and twenty-fifth.

Present: The Honorable Albert C. Thompson, district judge.

Among the proceedings were had the following, to-wit:

WILLIAM SHEPARD ET AL., Complainant-, *vs.* O. E. D. BARRON, Treasurer of Franklin County, Ohio, Defendant.	No. 924. In Equity.

Be it remembered, that heretofore, to-wit, on the 12th day of June in the year of our Lord one thousand eight hundred and ninety-nine, came the complainant- herein, by *its* solicitors and filed in the clerk's office of the court aforesaid *its* certain bill of complaint — is clothed in the words and figures following, to-wit:

Bill of Complaint.

3 Bill of complaint.

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

WILLIAM SHEPARD and CHARLES MCLEISH, Leonard Carr, Complainants, *vs.* O. E. D. BARRON, Treasurer of Franklin County, Ohio, Defendant.	In Equity. Bill of Complaint.

To the honorable the judges of the circuit court of the United States for the southern district of Ohio, eastern division:

Your orators, the above named complainants, are citizens of the State of Ohio, and they bring this suit against the above named defendant, O. E. D. Barron, who is treasurer of the county of Franklin, and State of Ohio.

Your orators say that the amount in controversy in this action, which is a civil action, amounts, exclusive of interest and costs, to more than two thousand dollars ($2,000.00), and that the controversy arises under the Constitution of the United States; that your orators

seek relief against the defendant by this suit, by reason of an attempt on his part to enforce against your orators a statute of the State of Ohio, the operation of which, if permitted, would take from your orators their property, without due process of law, and would deny to them the equal protection of the law, in contravention, and in violation of the provisions of said Constitution, and especially of section 1 of article 14 of the amendments to the said Constitution, and of section 1, of article 5, of said amendments.

Your orators are the owners of a tract of land which is situated in Marion township, of said county, and State, and which is described as follows, to wit:

Being part of half section No. 16 (number sixteen), section No. 11 (number eleven), township No. 5 (number five), range No. 22 (number twenty-two), refuge lands, as follows: Beginning at a stake in the center of the Columbus and Grandville turnpike road, northwest corner to land conveyed by Nathaniel Merion, trustee of John Barr to Elizabeth McCalla, and running thence along the west line S. 1 degree 45 minutes N. 124 poles to a stake in the south line of said half section; thence along said half section line N. 88 degrees W. 13½ poles to a stake in the center of Alum creek; thence up the creek with the meanders thereof No. 10 degrees 30 minutes W. 13 poles, N. 31 degrees 15 minutes, W. 1 pole N. 49 degrees 45 minutes, W. 42 poles, N. 36 degrees 30 minutes, W. 12.76 poles, N. 16 degrees 30 minutes, W. 30.75 poles, N. 10 degrees 15 minutes, W. 8.25 poles, N. 4 degrees 81 poles, N. 16 degrees 20 minutes, E. 971 poles to a stake in the center of said creek, where the center line of said Granville road crosses the same; thence along the center if said road N. 80 degrees E. 23 poles to the beginning, containing 39 acres one rood and 35 poles of land and water, be the same more or less, and being the same premises conveyed to John Barr by deed
4 dated October 18th, 1871, of record in the recorder's office of Franklin county, Ohio, Book 106, page 487, and conveyed by the said John M. Pugh, by deed dated November 21st, 1881, to the said William Shepard and Charles McLeish.

The said the Columbus and Granville turnpike road, has been more than fifty years, and is now, a public highway, and a county road of said county; and said tract of land is located and abuts on the south side of said road, having a frontage thereon of 1111 feet.

Your orators further say that, on or about March 31st, 1890, as your orators are informed and therefore allege, one Logan M. Bullitt, and others, whose names they are unable to state, presented a petition to the board of county commissioners of said county, which prayed for the improvement of East Broad street, in Marion township, Franklin county, Ohio, which street is identical with, and is the same highway as hereinbefore designated as the Columbus and Granville turnpike road, and on which said street the said tract of land then abutted, and now abuts.

The alleged petition, presented as aforesaid to said county commissioners, is not now on file in the office of said county commissioners, or in the office of the auditor of said county, nor was any

copy thereof made or kept by said board or auditor. Your orators are therefore unable to give a more definite statement of the contents and purport and scope of said petition.

Your orators further say that the said county commissioners entered an order on their record, on or about May 19th, 1890, authorizing and ordering the improvement of said street and road as prayed for by said petition. Said petition was filed pursuant to, and the said county commissioners pretended to make such order in obedience to an act of the legislature of the State of Ohio, entitled, "An act to authorize county commissioners in counties in which there are situated cities of the first grade of the second class to improve roads extending from such cities, and other roads and streets in certain cases," which act passed March 26th, 1890, and is published in 87 Ohio Laws, on page 113.

The said order of the said county commissioners authorized and directed that the said street and road should be widened from its then limits of sixty (60) feet to one hundred (100) feet, and that it should have a paved central portion about thirty-three (33) feet in width; that said paved part should be made of asphaltum, or other hard substance, and bordered by a single curbing of stone on each side; that the remainder of said street should be graded, the ordinary side drives constructed of gravel, and the cost of said improvement should not exceed $7\frac{25}{100}$ per front foot, and should be paid in ten annual installments.

Your orators further say that on May 19th, 1890, said county commissioners directed the appropriation of, and did appropriate, a strip of ground 20 feet wide along the whole front of said tract of land, and also along front of all lands which abutted on said street and road to the extent of the improvement that was ordered; that no compensation was ever assessed by a jury for said strip of land, your orators never having made any claim for the same; nor was any compensation made therefor in money, or secured by a deposit of money; and they further say that because no provision was made in the said assessment, under which said improvement was ordered and made, for the impaneling of a jury to assess said compensation, the said statute was declared and adjudged unconstitutional by the common pleas and circuit courts of said county, and also by the supreme court of the State.

Your orators further say that one William Fred Miller was also the owner of a tract of land which abutted on the said road and street, so ordered to be improved by said commissioners; that the said commissioners found and determined that the amount of damages which said Miller was entitled to, for land, buildings, and fences, appropriated for the widening of said street, should be the sum of twelve hundred and fifty dollars.

Your orators further allege that on or about August 4th, 1890, said commissioners issued bonds in the sum of fifty thousand dollars, the proceeds of which they ordered to be applied toward paying for such improvement, that on or about August 1st, 1891, they ordered additional bonds to the amount of sixty thousand dollars to be issued,

and the proceeds of which were ordered to be applied to the payment of the costs and expenses of said improvement.

Your orators further say that on or about August 18th, 1890, said commissioners entered into a contract with one N. B. Abbott, to construct said improvement, and that the said Abbott, afterwards, between August 4th, 1890, and October 1st, 1891, did construct said improvement; that on or about October 16th, 1890, said board ordered the county surveyor of said county to make a survey of the improvement, and to certify all the costs of said improvement, and that said surveyor complied with the said order; that his re-
6 port was received, examined and filed with the county auditor by the said county commissioners, and approved by said county commissioners, and the costs of said improvement were placed on the tax duplicate of said county, by the auditor, for collection. By said report, as approved by the said county commissioners, the costs and expenses of said improvement amount to eleven $\frac{1476}{1000}$ dollars for each front foot of said property.

Said real estate of your orators has been, since the last decennial appraisement, in 1890, valued for taxation at seventeen thousand seven hundred and seventy dollars.

Your orators further aver that on October 15th, 1891, by order of the said commissioners, the assessment for the payment of the costs and expenses of said improvement was made, and that the said assessment was made by the foot front, and not in proportion to the special benefit which resulted from said improvement to the abutting property; that the assessment included the twelve hundred and fifty dollars which was awarded, as aforesaid, to the said William Fred Miller; and that the part of the said costs and expenses, assessed in such manner, against the land of your orators, amounted to the sum of twelve thousand five hundred and eighty-six dollars and seven cents, with interest thereon at 6 per cent. per annum, payable semi-annually, from July 1st, 1890; and that the said assessment on said land of your orators was made upon the whole tract of land, and not upon the tract of land to the depth of 250 feet from the front of the same.

Your orators further aver that they have paid $11,981.22 on said assessment, but that there still remains unpaid of said assessment upon the tract of your orators the sum of $40002.34 *dollars*, with interest from July 1st, 1890.

The defendant threatens to collect the balance of said assessment, to wit, the sum of $4,002.34, under the statute of the State, authorizing the enforcement of the same as a lien on and against their said bill, and threatens to sell the said land if your orators do not pay the different installments of said assessment as fast as they become due; that an installment of said balance, namely, $1485.15 will be due on the 20th day of this month; and that the said defendant will proceed to collect the same, if not restrained by an order of this court.

On June —, 1899, your orators tendered the said defendant the

lawful amount of their legal taxes due on said real estate, to
7 wit, — dollars, but that the said defendant refused to accept the same unless the said installment of said assessment for said improvement should also be paid at the same time.

Your orators further say that if the said defendant, treasurer, should be permitted to enforce the collection of said assessment, or any part thereof, that it would be an irreparable injury to them.

Your orators say that they have no remedy in the premises, save by injunction; that by force of the statute of Ohio, when it is sought to impose upon the owner of reality any illegal assessment by injunction, he is not obliged to first pay the money on said assessment, and then bring an action to recover the same from the party who made the illegal assessment or collected the same.

Your orators further aver that the said assessment is illegal and unconstitutional; because it violates section 1 of the 14th amendment to the Constitution of the United States, and also the 5th amendment to said Constitution.

In consideration whereof, and inasmuch as your orators are remediless in the premises at law, and can have adequate relief only in a court of equity, to the end, therefore, that the defendant may answer the several matters and things hereinbefore set forth, and that this court will decree that said statute of the State of Ohio is null and void, and that the acts of the said county commissioners and auditor, and the threatened act of the treasurer are void, your orators pray that the said assessment made by said commissioners on the said land, and the said acts of the auditor, placing said assessment on the tax duplicate, and certifying the same to the treasurer for collection, may be decreed null and void; that the said defendant, treasurer, may be perpetually enjoined, restrained and prohibited from collecting any part of the said assessment yet unpaid, and from assessing any penalty against your orators for refusing to pay the same, and from instituting and authorizing, or directing any suit or suits, action or actions, or any proceeding against your orators to enforce the said pretended lien on the said property, or to collect the same from your orators; and that they may have such other and general relief as the nature of the case may require, and as to equity may seem right.

Your orators further pray that in the meantime, and during the pendency of this suit, the said defendant, his agents, attorneys, representatives, and employés, may be enjoined and restrained, as hereinbefore prayed.

8 May it please the court to grant unto your orators a writ of subpœna to be issued out of, and under, the seal of this honorable court, directed to said defendant, and commanding him to appear in this court at some day certain, to be therein named and to answer the averments of this bill, under oath, and to abide by and perform such decree as may be rendered herein.

PUGH & PUGH.
Solicitors for Complainant.

STATE OF OHIO, } ss:
Franklin County, }

William Shepard, being duly sworn, says that he is one of the complainants in the foregoing bill of complaint; that he makes this affidavit as such complainant; that he has read said bill of complaint, and is acquainted with the contents thereof, that the same is true of his own knowledge, except as to the matters and things stated therein upon information and belief, and as to those matters he believes them to be true.

WILLIAM SHEPARD.

Sworn to and subscribed before me by the said William Shepard this 3rd day of June, 1899.

[SEAL.]

E. L. DEWITT,
Notary Public, Franklin County, O.

Tax N. P. for 40c.

To the clerk of said court:

In the above cause please enter the appearance of O. E. D. Barron, as defendant, and Dyer & Williams as his solicitors.

O. E. D. BARRON, *Treasurer,*
By DYER & WILLIAMS,
Solicitors for Respondents.

And afterwards, to wit, on the 12th day of June, A. D. 1899, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal D, page 220.

Whereas, in the above entitled cause, an application for the issuance of a preliminary writ of injunction was duly filed and set down for hearing before the said court on the 12th day of June, 1899, at the United States court house in the city of Columbus,
9 notice of such application having been waived by the defendant herein; and the parties now appearing by their solicitors, and being heard upon such application, and it appearing that cause exists for the granting of writ of injunction, pending the final hearing of the cause, as prayed for. It is therefore ordered that upon the complainant giving security, by bond, in the sum of five hundred dollars, conditioned that the said complainant shall abide by the decision of the court, and shall — and truly pay to the defendant all damages and costs that will be sustained by him in case the injunction should be dissolved, a writ of injunction issue, commanding, restraining and enjoining the defendant, his agents, servants and attorneys from collecting any part of the assessment set out and described in the bill of complaint, and which is yet unpaid, and from assessir any penalty against said complainant for refusing to pay the sa

and from instituting and authorizing or directing, any suit, or suits, action or actions, or any proceeding against the said complainant to enforce the alleged lien described in said bill of complaint on the property of the complainant, or to collect the same from said complainant, until further order of this court, in the premises.

And afterwards, to wit, on the 12th day of June, A. D. 1899, the following bond was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Injunction Bond.

THE UNITED STATES OF AMERICA, *Southern District of Ohio,* } ss:

Injunction bond.

Know all men by these presents, that William Shepard and Thomas J. McLeish — held and firmly bound unto O. E. D. Barron, treasurer of Franklin county, Ohio, in the sum of five hundred ($500) dollars, to the payment of which they bind themselves, their heirs, executors and administrators firmly by these presents.

Sealed with our seals, and dated this 12th day of June, A. D. 1899.

The condition of the above obligation is such, that

Whereas, William Shepard, Charles McLeish and Leonard Carr, citizens of the State of Ohio, having filed on the chancery side of the circuit court of the United States for the southern district of Ohio, a bill against the said O. E. D. Barron, treasurer of Franklin county, Ohio, and having obtained an allowance, — a preliminary injunction, as prayed for in said bill, collecting and part of the assessment yet unpaid and from assessing any penalty against the property of complainant as described in said bill of complaint.

Now, if the said William Shepard and Charles McLeish shall abide the decision of said court, and pay all moneys and costs which shall be adjudged against them in case the said injunction shall be dissolved, then these presents shall be void; otherwise to remain in full force.

WILLIAM SHEPARD. [SEAL.]
THOMAS McLEISH. [SEAL.]

Signed and sealed in presence of.
C. P. WHITE.
J. A. WESTORE.

And afterwards, to wit, on the 16th day of September, A. D. 1899, following answer was filed in the clerk's office of said court, ded in the words and figures following, to wit:

Answer of O. E. D. Barron, Treasurer.

In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

WILLIAM SHEPARD, CHARLES MCLEISH, and LEONARD CARR, Complainants,
vs.
O. E. D. BARRON, Treasurer of Franklin County, Ohio, Defendant.
} In Equity.

The answer of the above named treasurer to the bill of complaint of the above named plaintiffs.

In answer to said bill, O. E. D. Barron, treasurer of Franklin county, Ohio, says as follows, viz:

I. He admits at the time of the filing of the bill, the complainants named therein were the owners of the real estate described in the bill, but says that thereafter, to wit, on the first day of July, 1899, by a warranty deed recorded in Deed Book 316, page 320, in the recorder's office of Franklin county, Ohio, the complainant, Leonard Carr, transferred and conveyed to Thomas J. McLeish and
11 John Busch, his undivided one-third interest in said real estate, in which deed said Thomas J. McLeish and John Busch assumed all taxes and assessments that may be a lien on said real estate, as a part of the purchase price for said premises, and that said complainant, Leonard Carr, has no further interest in the subject matter of this suit, and as to him the bill should be dismissed.

II. He admits that the Columbus and Granville road has for many years been a public highway, and that the tract of land described in the bill abuts on the south side of said road and has a frontage thereon of 1111 feet.

III. Defendant also admits that on the 31st day of March, 1890, Logan M. Bullitt and others, filed with the board of county commissioners a petition asking for the improvement of East Broad street (which is the same as the Columbus and Granville road), from the east side of Alum creek (which said creek is the east corporation line of the city of Columbus), eastward to a road known as the Cassady road, under the provisions of an act of the General Assembly of the State of Ohio, entitled "An act to authorize county commissioners in counties in which there are situated cities of the first grade, of the second class to improve roads extending from such cities or other roads or streets in certain cases," passed March 26th, 1890, and published in 87 Ohio Laws, page 113, which said petition has been lost or stolen and can not be found, and no copy of which has been preserved.

IV. Defendant admits that on the 19th day of May, 1890, the said

county commissioners entered an order on their record authorizing and ordering said improvements to be made, and that said improvement should be of the width of 100 feet throughout its entire length, and the county surveyor was ordered to survey said road and erect stakes in front of each parcel of property marking the lines of said roadway and doing whatever other work was necessary for carrying out said work as ordered.

V. This defendant denies that on the 19th day of May, 1890, said county commissioners directed the appropriation of, and did appropriate, a strip of ground 20 feet wide along the whole front of said tract of land belonging to complainant in the manner alleged in the bill, but defendant says that the truth in regard to the taking of said strip of ground is that complainants, by their petition filed with said county commissioners on said 30th day of March, 1890, requested that said roadway be widened from sixty to 100 feet and offered said 20 foot strip to said commissioners and voluntarily dedicated the same to public use for a highway, and requested said commissioners to improve the same and assess the cost of said improvement upon the abutting property, including the property of complainants in said bill described, and that no appropriation of said strip was necessary, nor was any made.

VI. Defendant further answering admits that said act of the General Assembly was by the common pleas and circuit courts of Franklin county declared and adjudged unconstitutional, "because no provision was made in the said act, under which said improvement was ordered and made, for the impaneling of a jury to assess compensation for complainants' land so taken for the widening of said roadway;" but defendant denies that this act recited in complainants' bill has ever been declared and adjudged unconstitutional by the supreme court of the State of Ohio.

VII. Defendant says that section 13 of the act of the General Assembly above referred to, with reference to which act the contract for this improvement was made, provides that when the said order for said improvement was made by said county commissioners the said county commissioners "shall designate two or more owners of property abutting on said improvement who, with the county surveyor, shall constitute a board which, after the contract for the improvement has been made by the commissioners, may elect a superintendent who shall see that said contract is performed according to the true intent, and all orders of the county surveyor in furtherance thereof are obeyed;" and that under and in accordance with said provision, the said county commissioners, on the 19th day of May, 1890, appointed J. C. Lunn, J. G. Mitchell, Albert McCalla, William Shepherd (one of the complainants), and John J. Dun, surveyor, as commissioners of the East Broad Street improvement of Marion township, and that said complainant, William Shepherd, accepted said appointment and acted as one of the commissioners for the making of said improvement.

VIII. This defendant further admits that on or about August 1st,

1890, said county commissioners entered into a contract with one N. B. Abbott for the construction of said improvement, and between that date and October 1st, 1891, said improvement was made, and that on or about October 16th, 1891, the county commissioners ordered the surveyor to certify all the costs of said improvements to the county auditor, and that said cost was placed upon the
13 tax duplicate of said county and amounted to the sum of $11.2476 per foot as in said bill alleged.

IX. This defendant also admits that bonds to the total amount on one hundred and ten thousand dollars were sold as alleged in complainants' bill for the purpose of paying for said improvement, and that complainants' said tract of land described in the bill is valued for taxation at $—, but defendant further says that said valuation for taxation was not, at the time said improvement was made, more than one-half the real value of said property.

X. Defendant further answering admits that the assessment for the payment of the costs and expenses of said improvement was made by the foot front, but he denies that said assessment was not made in proportion to the benefit which resulted from said improvement to the abutting property.

On the contrary defendant shows to the court that section 17 of the act of the General Assembly referred to in complainant's bill provides as follows, viz.:

"In no case shall said commissioners take action for the improvement of any road under the provisions of this act until after they shall have made a personal inspection and examination of the line of said proposed improvement, and are satisfied that with such improvement the foot frontage of the lands abutting thereon will be well worth double the estimated expenses of such improvement, which inspection, examination and estimate, together with their present valuation per foot front of such lands, shall be by said commissioners made a matter of record, and no improvement shall be by them ordered, unless said record justifies it."

On May 3rd, 1890, in compliance with section 17 above quoted, said board of county commissioners of Franklin county, in open session of the said board, made and entered upon their journal a finding that since the filing of the petition for the improvement of East Broadway street they made a personal inspection and *and* examination of the line of the proposed improvement and had made a personal examination of lands lying upon each side of the said proposed improvement and were satisfied, after such examination and inspection, that the said improvement will be for the public welfare and convenience. The said county commissioners further found that to construct the said improvement it would be necessary to assess the lands upon each side of the said proposed improvement about the sum of $7.25 per foot front, and that the valuation
14 at that time per foot front of lands fronting and abutting upon said proposed improvement is upon an average $20.00, and after the said proposed improvement had been made as prayed for in said petition the average valuation of lands abutting thereon per

foot front will be worth at least the sum of $40.00, which will be more than double the estimated expense of the said proposed improvement; all of which finding were made by and with the knowledge, consent and approval of said complainants, and they, and each of them, have acquiesced in said findings until the filing of their bill in this cause.

XI. The defendant further says that the complainants, and each of them, actively promoted and assisted in the making of all of said improvement and acquiesced in and authorized the making of all the expenditures and the assessments by the foot front complained of in their bill, and authorized the assessment of said costs against their property as described in the bill. In addition to what has already been set out in this answer, the more material acts in the promotion of said improvement by the plaintiffs are as follows, viz.:

1. The said complainants, together with others, signed the original petition which was filed with the said county commissioners on the 31st day of March, 1890, praying for the making of said improvement as in the bill alleged, and said board of county commissioners would not have ordered said improvement to be made, except for the acts and requests of complainants and others that said improvement be made.

2. On or about the — day of ——, 1890, the complainants under the name and style of the Alum Creek Ice Co., which name was used by said complainants in business, and which name was used by them interchangeably with their individual names in their transactions with said commissioners, with others, filed with the county commissioners a request in writing that a 15 inch sewer pipe be laid on the south side of the said street, and that a 24 inch sewer pipe be laid on the north side of said street, and that a suitable gutter be laid on the side next to the curb on the two outer drive ways on said Broad street, and "that the expense of said work be assessed against our respective property on said street, the same as other expenses for making said improvement are levied and paid." The construction of said sewers was necessary for the proper completion of said improvement, and said sewers were a direct benefit to the abutting property of complainants and others.

15 3. On or about the — day of ——, 1890, the said complainants filed with the said county commissioners a petition in writing signed by their own individual names, with others, in which petition they requested said county commissioners to cause all bonds issued for the payment of the expense of the said improvement to be for a period of 20 years from the date thereof; and stating also if said county commissioners could extend the time to 20 years for the bonds already sold, such extension of time would be satisfactory to said complainants.

4. On or about the 29th day of June, 1891, said complainants under the name of the Alum Creek Ice Co., together with other land owners abutting upon said improvement filed with the said county commissioners a written communication, whereby they expressly withdrew all objection to said improvement and the assessment of

their said real estate therefor on condition that the Columbus Land Association, one of the abutting property owners would secure and pay the entire expense of removing all the earth upon the circle in East Broad street, and beautifying and adorning said circle. Said circle was established by the county commissioners on the 18th day of August, 1890, and became a part of said improvement, and was declared to be a public circle, and was 250 feet in diameter, the land for which was donated by the Columbus Land Association, and said circle was dedicated for the public use.

5. On or about the 2nd day of September, 1891, the complainants, William Shepherd and Charles McLeish, and also the Alum Creek Ice Co., filed with the county commissioners of Franklin county, Ohio, a petition in writing in which petition they asked for the cancellation of that part of the contract with said N. B. Abbott, which provided for sodding the sides of said roadway, and in said communication the said parties last above named, together with other abutting property owners, each promised to see that grass seed was sown upon said driveways of said Broad street, and to take upon themselves the care and charge of the same, and in obedience to and in compliance with said petition the said county commissioners procured the cancellation of the part of said Abbott contract above referred to.

6. On the 28th day of September, 1891, the said plaintiffs, together with other abutting property owners, filed with the said county commissioners a written communication in which they recited that on the 31st day of March, 1890, a petition was by them presented to the board of county commissioners, praying for the extension
16 of East Broad street, as alleged in the bill in this case that said original petition had been signed by all persons owning property abutting upon the portion of said Broad street, on which said improvement was to be made; that proceedings were had by said board of county commissioners which resulted in an order for making said improvements in accordance with the prayer of their original petition; that said original petition, as well as other papers filed since said original papers, and certain orders made by said board of county commissioners relating to said improvement had been lost or mislaid; that since making said original order by the said board of county commissioners, directing said improvement to be made some important changes in the plan, extent and character of said improvement have been ordered by said board of county commissioners, or have been made, or are now being made at the written request of each and all of the subscribing property owners, including the construction of the circular park in said street, and sewers for proper drainage, and other things not herein particularly mentioned; that by reason of said changes and extensions, the cost of said improvement has been increased in a large amount beyond that contemplated, and which would have been sufficient according to said original petition and plan; that doubts have arisen as to the legality of the proceedings of said board of county commissioners in said matters, and of the bonds that have been or

may hereafter be issued by said board of county commissioners for the purpose of raising the amounts to pay the costs and expenses of said improvement.

"Now, therefore, in consideration of the said improvement as the same has been and now is being constructed, and in order that the bonds heretofore issued and to be issued to pay for said improvement may not lie under suspicion, or remain unsold by reason of the absence or loss of said original or other papers and orders, or by reason of the other matters, acts and things hereinbefore stated, we, and each of us, hereby agree that such petition hereinbefore recited was filed, signed by us as herein stated, and that we will not set up as a defense against the collection of any assessment upon our said property abutting upon said improvement, for the payment of bonds issued, or to be issued on account thereof, any informality or irregularity arising from the absence or loss of any of said papers, or any of the other matters and things hereinbefore recited, but agree that said improvement has been and now is being legally made and constructed, and we hereby request that you exe-
17 cute and issue such further amount of bonds as shall be necessary to pay the costs of said improvement."

XII. Defendant further answering says that the complainants and other petitioning land owners by the express language of their petition filed as aforesaid on March 30th, 1890, asked said county commissioners to make said improvement under and in accordance with the provisions of the act of the General Assembly named in the bill, and said improvement was so ordered, and defendant says that said county commissioners, in ordering and making said improvement, conformed fully with the terms, conditions and provisions of said act, and constructed said improvement in all respects in substantial compliance with the complainants' original petition and the subsequent changes therein, made at complainants' request, so that defendant avers, every material detail of said improvement was made, at and in accordance with complainants' request and with complainants' knowledge and approval.

XIII. Defendant further says that from and between the time of the completion of said improvement, and the filing of the bill in this cause, from the year 1892 to the year 1898, inclusive, complainants have, without protest, paid seven annual installments of said assessment so made against their land as in their bill alleged, each annual payment being $1258.61.

XIV. This defendant further answering admits that the sum of $1250 was granted and allowed by said county commissioners to one William Fred Miller for damages for land appropriated for the construction of said East Broad Street improvement, but this defendant does not know and can not state whether it is the fact that said $1250 so appropriated to said Miller was by said county commissioners charged in as a part of the costs and expenses of said improvement aad assessed against the abutting lands as alleged in the bill.

XV. Defendant further answering says that by reason of the

admissions made in complainants' bill and by reason of the facts set out in this answer, the complainants and each of them are by the universal principles of equity and by repeated and long-standing decisions of the supreme court of the State of Ohio, clearly estopped from obtaining the relief by injunction prayed for in their bill; that said decisions by the supreme court of the State of Ohio have long since established a rule of property with reference to the collection of street improvement assessments in this State, to the effect that active participation in causing such improvement
18 to be made, even under an unconstitutional law, will estop the parties engaged therein from denying the validity of the assessment; which rule of property the Federal courts of the United States ought to recognize and enforce, and that said complainants have brought this cause and are seeking to prosecute the same in this court for the purpose of avoiding and shunning the well known and long established and equitable rules of estoppel declared by the supreme court of the State of Ohio, and for the purpose of escaping the application of the aforesaid rule of property, and of overturning the said decisions of the supreme court of the State of Ohio.

XVI. Defendant denies that any Federal question is raised by the facts of this cause and denies that the facts shown by said bill and answer in any way contravene or are repugnant to section 1 of the fourteenth amendment to the Constitution of the United States, and section 10 of article 1 of said Constitution, or either of said sections.

Wherefore, this defendant having fully answered, confessed, traversed and avoided or denied all the matters in said bill of complaint material to be answered, according to his best knowledge and belief, humbly prays this honorable court to enter its decree dissolving the restraining order heretofore granted in this case, and this defendant be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

DYER AND WILLIAMS,
Attorneys for Def't.

STATE OF OHIO, }
Franklin County, } ss:

O. E. D. Barron, being first duly sworn, says that he is the defendant in the foregoing cause, and is the duly elected and qualified treasurer of Franklin county, Ohio, and that the facts stated in this foregoing answer are true and correct to the best of his knowledge and belief.

O. E. D. BARRON.

Sworn to before me and subscribed in my presence this the 8th day of August, A. D. 1899.

GEO. H. BARRERL,
[SEAL.] *Notary Public, Franklin County, Ohio.*

Tax notary fee and costs.

19 And afterwards, to wit: on the 5th day of December, A. D. 1899, the following entry was made on the journal of said court, clothed in the words and figures following, to wit:

Journal D, page 326.

Upon application of complainants herein by their solicitors and by the consent of counsel for defendants, leave is granted complainants to file an amendment to the bill of complaint herein forthwith, and same is filed.

And afterwards, to wit, on the 5th day of December, 1899, the following amendment to bill of complaint was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Amendment to Bill of Complaint.

In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

William Shepherd, Charles McLeish, and Leonard Carr, Complainants, *vs.* O. E. D. Barron, Treasurer of Franklin County, Ohio, Defendant.	In Equity.

Amendment to bill of complaint.

To the honorable judges of the circuit court of the United States, southern district of Ohio, eastern division:

The above named complainants, by leave of the court in that behalf first had and obtained, brings this, their amendment to their bill of complaint against the respondent, O. E. D. Barron, treasurer of Franklin county, Ohio.

And thereupon your orators complain and make amendment to said bill as follows:

1. After the word "same" at the end of the first paragraph on 6th page of the said bill, insert this allegation: "Your orators aver that the said assessment on their property was greatly in excess of the fair market value of their land to the depth of 250 feet from the said Columbus & Granville turnpike, after said improve-
20 ment was made; that the said assessment could not lawfully be made upon said land beyond said depth of 250 feet; that the said assessment was greatly in excess of the special benefits conferred upon the said land by said improvement."

2. After the word "paid" in the second paragraph on said sixth page, of said bill, insert the following: "$11,981.22."

3. After the figures "1890," at the end of the said second para-

graph on said 6th page of said bill, insert the following allegation: "And your orators affirm that the amount which they have, as above stated, paid on said assessment is greatly in excess of the benefits that were conferred by the said improvement upon their said land, either considered as a whole tract, or as a tract of land of the depth of 250 feet from the road."

Wherefore, your orators pray, as they have heretofore prayed in their original bill of complaint; that said respondent may answer, but not under oath, such oath being hereby waived, according to the practice of this court, all and singular the things and things stated and charged in said original bill of complaint, and those hereinbefore stated and charged in this, the amendment to the bill of complaint of your orators.

PUGH & PUGH,
Solicitors for Complainants.

STATE OF OHIO, *Franklin County,* } ss:

William Sheperd, being duly sworn, says that he is one of the complainants in the foregoing amendment to bill of complaint; that he makes this affidavit as such complainant; that he has read said amendment and is acquainted with the contents thereof; that the same is true of his own knowledge, except as to the matters and things stated therein upon information and belief, and as to those matters he believes them to be true.

WILLIAM SHEPHARD.

Sworn to and subscribed before me by the said William Shepard, this 4th day of December, 1899.

[SEAL.] GEO. L. STONGHTON,
Notary Public for Franklin County, Ohio.

Taxed 40c.

And afterwards, to wit, on the 16th day of May, A. D. 1900, the following replication was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

21 *Replication.*

Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

WILLIAM SHEPARD, CHARLES MCLEISH, and LEONARD CARR
vs.
O. E. D. BARRON, Treasurer. } In Equity.

Replication of complainants in above cause to the answer of the defendant, O. E. D. Barron, treasurer.

These repliants, saving and reserving all advantages of exception to the manifold insufficiencies of such answer, for replication thereto say, that they will aver and prove their said bill and amendment to said bill to be true and sufficient, and that the said answer is untrue and insufficient.

Wherefore, they pray relief as set forth in their said original bill.

PUGH & PUGH,
Solicitors for Complainants.

And afterwards, to wit, on the 19th day of June, 1900, the following answer was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Answer.

In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

WILLIAM SHEPHARD ET AL.
vs.
O. E. D. BARRON, Treasurer, etc.

Answer to amended bill of complainants.

To the honorable judges of the circuit court of the United States, southern district of Ohio, eastern division:

22 Defendant herein, by leave of court in that behalf first obtained, files this his answer to the amended bill of complain*ant* filed against defendant, and says he admits that said assessment could not be made upon said land of complainants beyond the depth of 250 feet, and that he does not claim as the treasurer of Franklin county, Ohio, a lien upon said premises beyond that said depth. He denies that the said assessment was in excess of the

market value of said premises to the depth of 250 feet from said improvement, and that said assessment was in excess of the benefits conferred on said land by reason of the construction of said improvement, and that the amount which complainants have already paid upon said assessment is in excess of the benefits conferred by said improvement upon said land.

Wherefore, defendant prays as he heretofore prayed in his original answer, that said cause be dismissed.

DYER, WILLIAMS & STOUFFER,
TAYLOR, SEYMOUR & WEBER,
Attorneys for Defendant.

STATE OF OHIO, *Franklin County,* } ss:

Nelson A. Sims, being first duly sworn, says that he is the duly elected, qualified and acting treasurer of Franklin county, Ohio, and as such treasurer is defendant in the above entitled cause; that he has read said answer to the amended bill of complaint, and is acquainted with the contents thereof; that he believes the facts contained therein are true.

NELSON A. SIMS.

Sworn to before me and subscribed in my presence, this 18th day of June, A. D. 1900.

[SEAL.] CHAS. I. STOUFFER,
Notary Public, Franklin County, Ohio.

23 And afterwards, to wit, on the 19th day of June, A. D. 1900, the following testimony was filed in the clerk's office of said court, clothed in the words and figures following, to-wit:

Testimony on Behalf of Both Parties.

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

WILLIAM SHEPARD, CHARLES MCLEISH, and LEONARD CARR, Complainants,
vs.
O. E. D. BARRON, Treasurer of Franklin County, Ohio, Defendant.

By agreement of parties, by their counsel, the depositions of the witnesses within named were taken before Mr. George L. Stoughton, notary public, at the office of Pugh & Pugh, between the 28th day of May, 1900, and June 18th, 1900.

And it was further agreed that said depositions should be taken by a stenographer, Miss Minnie Rodgers; that the testimony should

not be required to be reduced to writing in the presence of the notary; that the witnesses should not be required to sign their names to their respective depositions, and that the testimony should be transcribed from the notes of the stenographer.

Present: Pugh & Pugh, for complainants. J. H. Dyer and A. T. Seymour, for defendant.

ANDREW MORRISON, a witness produced on behalf of complainants, being first duly sworn, testified as follows:

Examined by Judge D. F. PUGH:

Q. Give your name?
A. Andrew Morrison.
Q. Occupation and residence?
A. Jefferson township, Franklin county, Ohio.
Q. Occupation?
A. Farmer.
Q. How long have you lived in Franklin county?
A. Forty-eight years this last spring.
Q. Are you acquainted with the tract of 40 acres of land, situated on the Columbus and Granville road, a continuation of Broad
24 street, and owned by the complainants at the time this suit was brought?
A. Yes, sir; that is, with the ice company's property—yes.
Q. How long have you known of that tract of land?
A. Ever since I was in this county.
Q. I will ask you whether you owned a tract of land near there?
A. Yes, sir, adjoining it on the east.
Q. Are you acquainted with the improvement that was made on the Columbus and Granville road in front of this property?
A. Yes, sir; that is with the street, you mean?
Q. Describe the improvement that was made, and when it was made?
A. Well, the property is—the improvement is an asphaltum street, I think about 30 feet wide with asphaltum, and then on the sides they made an improvement and called them parks—small parks about 6 or 8 feet wide.

Mr. Dyer, counsel of defendant, objects because the petition sets that out, and the defendant admits it.

Witness continuing: The side drives of crushed stone, I couldn't tell exactly the width, but I think about 14 feet, probably on each side.
Q. When was that improvement made?
A. Why, I think it was in—I think it was commenced about 1890.
Q. When was the improvement begun and completed?
A. I think it was commenced in the fall of 1890, and completed in the fall of '91. That is my recollection of it.

Q. When it was finished what was the relation between the grade of the street or road, and the grade of the property of the complainants?

A. Why, that is, the difference between the full grade——

Q. The road is finished and the property—how did the grades correspond, and how did they differ?

A. From what it originally was?

Q. Just as they were when it was finished?

A. At the west end I think it was higher.

Q. Which is higher?

A. The street appears—the street towards the center, or the middle of the property, it runs downward.

Q. What runs down?

A. The street, then I think it rises a little again.

Q. Where is the grade of the road higher that the grade of the property when it was finished?

A. Why, at the west end.

Q. How was it at the east end?

A. Well, I think at the east end it was higher that the property near one end.

Q. When it was finished is what I want to know.

A. Well, I think it is higher at the east end; that is my recollection now.

Q. Do you know of any property having sold in that immediate vicinity before or about the time the improvement was begun?

A. Well, there was property sold there—considerable property.

Q. How near this property?

A. Well, within 50—or within about 60 rods; that is the nearest to this property—60 rods from it.

Q. What in your judgment, was the property of the complainants worth; that is, what was its cash market value just prior to the construction of the improvement of the road?

A. Well, all that I would have to guide me would be the sales of the best property that was sold, and still that wouldn't be a very correct guide, because this property that we are speaking of now was low bottom land, first bottom ground, and there was some of that ground good only for the purpose that they used it; that is, for an ice pond, or for agricultural purposes; I wouldn't consider it worth any great deal for building purposes, and some of it was; but I think as to the value, judging from this other property, about $600 of $700 an acre would be all it would be worth.

Counsel for defendant objects to the descriptive portion of the answer, and also to the complete answer, for the reason that the value stated has no reference to the value of the property at the time the improvement was made.

Q. Assuming that the land covered by the assessment in question in this suit, was a strip 1119 feet long, 250 feet wide or deep, and amounted to 6.42 acres, what would that strip we worth—what was

that strip worth in cash just before said improvement of the road was made?

A. Running back 250 feet?

Q. Yes, sir.

A. Well, I suppose it would be worth a little more than the whole tract by it fronting on the street.

Q. You mean it would be worth more than the whole tract, or more per acre?

A. More per acre than the whole tract.

Q. How much in dollars and cents?

26 A. Well, I suppose about a thousand dollars.

Q. Now, then, give in your judgment what the whole tract was worth immediately after the improvement was completed?

A. The whole 40 acres, do you mean?

Q. Yes, sir.

Answer objected to by counsel for defendant for the reason that the entire tract is not in question, the assessing district being limited to 250 feet.

A. I am to answer what I think the whole tract was worth?

Q. Yes, sir.

A. Well, I suppose it would likely be worth about $200 an acre or more.

Q. More than what?

A. That what it was before; no, I don't think it was worth more—I don't think it was worth more than $100 an acre, that is the whole 40 acres, if it was worth that.

Q. $100 an acre what?

A. More after it was done that before, if it was that.

Q. Now, what, in your judgment, what was the strip consisting of 6.42 acres, described in the preceding question, worth in cash after the improvement was finished?

A. That improvement, I think, benefited some of it, and I think others it wasn't any benefit to It damaged it; that is, by the change of grade—by the change of grade.

Q. The question is, how much was the strip worth?

A. Well, I don't think that it benefited it any more than $200 an acre, taken on the whole, after it was done than before it was done.

Q. Do you know the length of the whole improved road, or about how long it was?

A. Why, I have always understood about 5000 feet. I think maybe 4900; somewheres in the neighborhood of 5000 feet, I have always understood. I can not tell exactly.

Q. Where is the west end of the improved road?

A. Why, at the bridge that crosses Alum creek.

Q. Now, I will ask you whether there is any hill along the road—improved road, and if so, where it is located?

A. Yes, there is on my property.

Q. How far is the hill from the west end of the improved road, or the Alum Creek bridge?

A. Well, there is 1100 and some feet—well, I suppose it is about 14 or 15 hundred feet from the bridge from where you strike the hill; 11, I think—about 14 or 15——

Q. What is the front of that property in feet?

27 A. 935½.

Q. Now, what is the situation of the property fronting on this improved road from the top of the hill and east of your property, to the other end of the improved road, with reference to the grade of the road?

A. Well, what you might call a hill there is on my property, and as you go east the grade—that is, the grade gets less, and it continues getting less, until you go to the circle; I think there is a little raise there right at the circle, and then if you go east why, there is scarcely any cut at all. That is on the Beningnus and Miller property. In that syndicate property I think it would run from 5 to 6 feet of a cut to 2 or 3; and the other property as you go east it gets less.

Q. Are you now describing property on one side or both?

A. Both sides; the syndicate property.

Q. How much of the 5000 feet at the time the improvement was made was owned by what you call the syndicate?

A. Why, I have understood, always, that it was pretty near half—not quite. I should think that there would be probably 23 or 24 hundred feet, that it is taking a rough guess; I have no measurements to go by; but it is nearly one-half, I always understood.

Q. What, in your opinion, was the difference in the special benefit derived by the syndicate's property from the improvement, and the special benefit derived to the property of these complainants?

Question objected to by the counsel for defendant.

A. By the change of grade from the old road before the improvement commenced. It seems to me that the syndicate got all the benefit, or nearly so, in that—nearly all the benefit—all the special benefit; that is, by the change of grade.

Answer objected to by counsel for defendant, because it is not responsive to the question.

Q. What kind of a road is Broad street, or the Columbus and Granville road?

A. What kind of a road was it?

Q. Yes.

A. Before the improvement?

Q. No, since the improvement. Is it a general thoroughfare, or is it an obscure road?

A. It is a very general road; one of the most public roads that come into the city.

Q. How much is it traveled?

A. It is traveled a great deal—a great deal. I could not

28 tell the amount of people that goes along it. It is a very public road.

Cross examination.

Examined by Mr. J. W. DYER:

Q. Mr. Morrison, what was the property belonging to the complainants used for prior to the date of the improvement of East Broad street?

A. That is immediately before?

Q. Give us your answer.

A. Why, they use it for an ice pond, and they farm it some.

Q. I understand you that it was used in the winter time for an ice pond?

A. Yes, and for a levee around it.

Q. And in the summer time they cultivate the soil?

A. Yes.

Q. What ice company, if you know, uses that for that purpose?

A. There is only one that I know, the Alum Creek Ice Company.

Q. Who, if you know, composes the Alum Creek Ice Company?

A. I have always understood that at that time Dr. Shepard, Mr. Carr and Mr. McLeish.

Q. The three complainants named in the case?

A. Yes, that is what I have always understood.

Q. I will ask you, Mr. Morrison, whether or not you ever instituted any proceeding in any court to restrain the collection of the assessment levied against your property, which abuts upon this improvement?

A. Yes, sir.

Q. In what courts?

A. Why, in the circuit court.

Q. Franklin county?

A. Yes, sir.

Q. State whether or not the trial of the issues involved in that case has been had in that court?

A. Yes, sir.

Q. State whether or not all the complainants in this case were witnesses in that case, to the question of benefits to your property?

A. Well, Dr. Shepard was, and I believe Mr. Carr, but I don't know whether he testified or not, but I guess not.

Q. Were you present along this improvement at the time it was made?

A. Why, I seen it a making.

Q. Had you any conversation with either of complainants
29 in this case prior to the time this improvement was ordered, or during the time it was being constructed?

A. I don't think I had; I have no recollection of it.

Q. Your property lies east of the property of complainants?

A. Yes, sir.

Q. On which side of the improvement?

A. On the same side.

Q. On the south side of the improvement?

A. Yes, sir, on the south side.

Q. Do you make up your judgment as to the special benefits to the property of complainants in any part from your judgment of the special benefits to your own property?

A. No, I don't think that I did, because they are not exactly situated alike.

Q. What opinion or knowledge had you as to the value of the property of complainants prior to the making of this improvement?

A. I think I answered that, Mr. Dyer, that is, by saying that all I could go by was the property that was sold in that neighborhood.

Q. Mr. Morrison, how far do you live from East Broad street, or did you live, at the time this improvement was made?

A. About five or six miles.

Q. Were you specially acquainted with the values of property along East Broad street prior to the time this improvement was made?

A. Only by the sales that I heard of.

Q. Did you not hear of these sales subsequent to that time?

A. That is before that time?

Q. That is not answering my question. I mean subsequent to the making of the improvement?

A. Yes, sir; I heard of these sales.

Q. Now, prior to the time of the improvement, did you have any opinion or special knowledge as to the value of property along this improvement along East Broad street?

A. Before the commencement of the improvement?

Q. Yes.

A. From the sales that took place—I heard of these sales, what the property was selling for along Broad street.

Q. What sales have been made before the improvement was made that you now recall?

A. Why, there was lady by the name of Mrs. Draut, I believe.

30 Q. What did she give?

A. I understood a thousand dollars an acre.

Q. To whom did she sell?

A. To this syndicate.

Q. Who else?

A. Why, Mr. Denmead.

Q. To whom did he sell?

A. To this syndicate, I believe.

Q. Who else?

A. I think Mr. Wall and Mr. Calendare.

Q. To who did they sell?

A. To this syndicate, I understood.

Q. Give the price?

A. I heard a thousand dollars an acre.

Q. Do you know of any other property selling?

A. Why, yes, Mr. Loop.(?)

Q. To whom did he sell?

A. To Mr. Tracy and Powell, I think.

Q. What consideration did they give?
A. A thousand dollars an acre, I understand.
Q. All the sales you have now spoken of were made to the syndicate, or to Mr. Powell and Tracy?
A. Yes, all I can call to mind.
Q. The syndicate you refer to is what is known as the Philadelphia syndicate?
—. ——.
Q. Do you know whether or not that syndicate has subdivided the properties which they bought?
A. Yes, sir; I have understood so; I have seen the plat of it.
Q. Do you know of any sales that were made prior to the syndicate purchases?
A. It seems to me that Mr. Willis sold to somebody. Probably it was to Wall and Calendar; I am not positive about that.
Q. What Willis is that?
A. That is where Tallmadge lived.
Q. What did he give for his land?
A. I heard $600.
Q. An acre?
A. Yes, that is what I heard.
Q. Do you know of any other sales?
A. Yes, I think that there was the Ruhl sales.
Q. To whom did they sell?
A. I think to the syndicate.
Q. What did they get?
A. Why, I heard $1200.
Q. An acre?
A. I can't tell; it is only hearsay.
31 Q. What other sales?
A. That is all I call to mind.
Q. Mr. Morrison, if you know I wish you to state what was the market value of land in the vicinity of this improvement per acre prior to the purchase of what is known as the Philadelphia syndicate?
A. Why, I haven't heard of any being sold; I believe I can only think of this land of Willis'. There might have been some, but I can't think of them now.
Q. Well, if you know you may state what was the market value of land in the vicinity of this improvement per acre from the years '85 to '87 and '8?
A. Well—'85—I can't tell what year that Willis sold.
Q. I am not asking for any particular sale. I am asking for your judgment of the value.
A. I don't think I knew of any but the Willis property——
Question read.
A. Well, in '85 land in that neighborhood was rather dull—in '85, and I have nothing to go by, except that Willis property, and I can not tell what year it was sold in, but somewheres between '85 and '88.

Q. Would you say that $600 was a fair market value per acre for the property in the vicinity of this improvement between the years '85 and '88?

A. Yes, along about that I think that would be.

Q. Now, from '88 on to '91 and '2, what would you say was the fair market value of the property per acre in that vicinity, in the vicinity of this improvement?

A. Well, the only thing I have to go by——

Q. Give me your judgment?

A. Well, I will tell you, Mr. Dyer, my judgment is this, as the thing has proved since——

Q. No, no——

(Witness continuing:) I will say what a thing sells for that is what it is worth.

Q. I want your judgment in the matter.

A. I suppose about a thousand dollars, that is the only way I can answer the question.

Q. To what do you attribute the increase in value of the land in the vicinity of this improvement per acre from 1888 to '91, over the value from '85 to '88?

A. Well, there was what I call a craze come over the people—I can't call it by any other name.

Q. What caused the craze?

A. Well, I can't tell anything else only this syndicate buying this land, and every body seemed to go wild over that. I con-
32 tended at the time that it was a good deal of a bubble. I suppose I could find a dozen people to whom I expressed my opinion in that way.

Q. Was the improvement of Broad street, East Broad street, contemplated at the time the syndicate purchased this property?

A. Not that I know of; if it was contemplated it was in their mind, because I don't think anybody else did know, as I am interested in that property—in the property along that road.

Q. When did you first hear of the improvement of East Broad street?

A. Why, some time after—I can't tell the year the syndicate bought, but I think it was about '88.

Q. Wasn't that about the time they were making these purchases?

A. Which, the street contemplated?

Q. Yes; wasn't the improvement of East Broad street talked about by the property owners along East Broad street about the time these purchases were being made?

A. No, sir; not that I heard of. Now, I will give you, if you want me to, my reason for that.

Q. I don't want your reason; I ask for the fact.

A. I didn't hear of it.

Q. Mr. Morrison, wasn't East Broad street the only means of access to the lands purchased by this syndicate, and to the lands of he complainants herein at the time this improvement was made?

A. It was the only public road that I knew of.

Q. Were there any bridges across Alum creek at that time, except the bridge across Alum creek on East Broad street?

A. No, there wasn't.

Q. The syndicate that you spoke of purchased property on both sides of East Broad street, didn't they?

A. Yes, sir.

Q. Since East Broad street was improved have you known of any sale of property abutting on the improvement?

A. Why, I have heard of two lots being sold, and this property of Markeson's being sold.

Q. Which lots do you refer to?

A. Why, it seems to me one bought by Tracy, and one by Van Horn.

Q. If you know you may state what Tracy paid for his lot?

A. Well, I have understood $70 or $75 a front foot.

Q. What was the purchase price of the Van Horn property?

33 A. About the same, it was either $70 or $75, I am not positive.

Q. These lots are located east of complainants' property?

A. Yes, sir.

Q. On the same side?

A. No, sir; on the north side.

Q. Do you know of any other sales?

A. On that street?

Q. Yes, sir.

A. No, nothing only this property of Markeson's; sold at public sale, I understood.

Q. Wasn't that recently?

A. Yes, that was recently.

Q. Do you know of any other property selling on adjacent street-?

A. Only by hearsay.

Q. What did you hear on that subject?

A. I heard—I understood that there was other lots on cross streets sold.

Q. Well, what prices per foot front?

A. $1500, I understood; their lots was 100 feet front, that would make $1500.

Q. Do you know the size of these lots?

A. I understood 100 by 250—100 feet front, 250 feet deep.

Q. What fraction of an acre would that make?

A. About two-thirds.

Q. The property sold on adjacent streets, if I understand you, at the rate of about $2,000 per acre?

A. Yes, sir; about that way.

Q. Have you known of any other sales of property on Broad street, on East Broad street abutting immediately in the street for less than $75 a front foot?

A. That is all I have heard of—these two lots being sold.

Q. Do you know of any property being sold on adjacent streets for less than about $2,000 per acre?

A. I haven't heard of any, no; I haven't heard of any being sold only these lots.

Q. Do you know whether or not the persons who purchased the lots on adjacent streets assumed the assessment, if any, on their property?

A. That is what you might call back lots; no, I think not; I understood only on Broad street. I understood the syndicate paid for the street.

Q. In other words, the sales made of the lots on Broad
34 street, you understood the syndicate paid the assessment and the purchaser took the lot free from the assessment.

A. That is what I understand.

Q. Mr. Morrison, would you say that the purchase price of the lots abutting on Broad street was the fair market value of the property at the time these purchases were made?

A. Well, they were sold for that is all that I can say.

Q. I want your judgment now.

A. My judgment would be that they were sold at two or three times what they were worth.

Q. Is that your judgment now, or is it your judgment of the value at that time?

A. Why, my judgment at that time.

Q. A while ago you said in your examination in chief that you had no other means of determining the value of property on that improvement except the selling price. You gave it as your judgment that $600 was the fair market value in '85, and that $1,000 was a fair market value from '88 to '91, because property had sold during these periods for that amount. Now, why do you change your individual judgment as to the market value of property abutting on East Broad street when there have been no sales less than $75 a front foot?

A. Well, you're right; that would be the only judgment that I could give—that is, by the sales.

Q. Then, if I understand you, you say that, basing your judgment on these sales that $75 a front foot was the market value at the time these sales were made?

A. Yes—I have always heard it said whatever a thing sells for that is its value.

Q. You say that was the value of the property abutting on Broad street when these sales were made—75 per foot front?

A. In that way, by the sales.

Q. Well, you base your individual judgment on the sales made prior to the improvement by the selling price; now, then, do you base your individual judgment upon the market value subsequent to the improvement by the selling price?

A. Yes.

Q. And then you say that $75 a foot front was the fair market value subsequent to the improvement?

A. That was what it sold for.
Q. Is that your judgment, then?
A. My own judgment is that the property—that is my private judgment is that the property all sold too high.
35 Q. How did you change your private judgment after the improvement was made from the basis of the selling price, when you did not change your individual judgment of the value prior to the improvement based on the selling price?
A. My individual judgment, as I told you when it was selling for a thousand dollars an acre was too high; that was my individual judgment.
Q. I didn't so understand you. Isn't it a fact, Mr. Morrison, that a large part of your judgment as to the value of this property is based on your personal opinion as to the value of property on East Broad street?
A. No, sir; I could find plenty of people that I expressed my judgment then that this property—when it was sold—that it was too high. That is when it was sold for a thousand dollars an acre—that it was too high.
Q. You were interested in this property, were you not?
A. Yes, sir.
Q. Before this improvement was made, or about the time it was being made, did you have any offers to purchase the property, or did you know of any pretended purchases in which you were interested?
A. Why, yes; John Mitchell asked me if I wouldn't—he was the agent or acted as such, for the syndicate—and he wanted me to ask—to make Mr. McCalla an offer for him, and I done so.
Q. State what that offer was?
A. $1200 an acre.
Q. What did you do?
A. I made him the offer.
Q. Well, tell us about it.
A. Well, I told him that I would make him an offer, and he said that if I had a mind to I could retain a third interest in it, or whatever I had a mind to.
Q. McCalla said?
A. No, John Mitchell. I told him that I would make McCalla the offer, and I done so. I met John Mitchell——
Q. I am interested in what you said to McCalla.
A. Well, I told him that I had come to make him an offer for his land, and he said All right, what is it? And I told him.
Q. What did you tell him?
A. I told him $1200 an acre.
Q. That is for all of his land?
A. All of his land.
Q. How many acres?
A. 45.
Q. How much of his land abutted on this improvement?
36 A. 935½ front feet.

Q. How far did it extend back from the improvement?

A. Why, I think 137 rods—that is one thing you have to consider—about 137 rods.

Q. This was including the price for the entire tract?

A. The entire tract.

Q. Now, what did he say?

A. Why, he said, why no; he says I have been offered he says—well, I think it was $1500 a front foot—$1500 an acre. Mr. Keys had offered him, I think he said $1500 an acre, and says he, I would hate to price it to you at $2,000. So, of course, I had no more to say.

Plaintiffs' attorney objects to conversation with McCalla, as hearsay.

Q. I will ask you to state, Mr. Morrison, if it is not a fact that Mr. McCalla had an offer of $1500 an acre from Mr. Keys for his property along this improvement, and consulted with you as to whether the sale had better be made?

A. No, sir.

Q. And if you did not advise McCalla at the time not to sell the property?

A. No, sir.

Q. Did you urge McCalla at the time you talked to him and made him the offer of $1200.0– an acre to accept it?

A. No, sir; because when he said that he would hate to price it to me at $2,000, I thought it wasn't worth while to urge the matter any further.

Q. About what time—give us the date of the conversation now that you had with John Mitchell, and also the date of the conversation with McCalla?

A. Why, I seen him nearly every day.

Q. What was the date?

A. I could not tell you.

Q. Was it before the improvement was made?

A. It was *the* before the improvement was made.

Q. Had the Philadelphia syndicate at that time been making purchases?

A. There had been but one.

Q. Was this improvement then in contemplation?

A. When they were making this offer?

Q. Yes.

A. I could not tell whether it was in contemplation or not; but I do say this, that it was not commenced, because I drove out on the roads on my way home.

37 Re-direct examination.

Examined by Judge PUGH:

Q. You said to Mr. Dyer that the lots that were sold on Broad street—that were located south of Broad street—for $1500 a foot front, that was $2,000 an acre.

A. I suppose that would make it something like that; I don't know that exactly.

Q. I will ask you to make the calculation; isn't it nearer $1500 an acre?

A. I didn't calculate exactly.

Q. Did you hear of the sale of the Stansberry property after the improvement was completed?

A. There was Stansberry property sold, but I could not tell whether before or after the improvement was completed; I could not tell you; and I forget, too, there was some colored people that had a piece of land that the syndicate bought; I could not tell.

Q. That was before the improvement?

A. That was before.

Q. How much did they pay for?

A. I understood a thousand dollars an acre.

And also WALTER H. MARTIN, a witness produced on behalf of plaintiff, who, being first duly sworn, testified as follows:

Examined by Judge D. F. PUGH:

Q. Give your name, occupation and residence?

A. Walter H. Martin; real estate and loan agent; 69 Miami Ave., Columbus, Ohio.

Q. How long have you lived in the city of Columbus?

A. Thirty-six years and three months.

Q. How long have you been engaged in the real estate business?

A. Twelve years and three months.

Q. Are you acquainted with the property situated on East Broad street, east of Alum creek, on the south side of the street, and abutting on the road, and owned by Dr. Shepard, Mr. McLeish and Mr. Carr?

A. The ice property there you mean?

Q. Yes.

A. Yes, sir.

Q. How long have you been acquainted with that property?

A. About thirty years, pretty nearly.

38 Q. Are you acquainted with the improvement of Broad street, east of Alum creek?

A. Yes, sir.

Q. Do you know what kind of an improvement it was?

A. Yes, sir.

Q. Do you know about the time that it was made?

A. Why, I think '89 or '90.

Q. I will ask you if you are acquainted with the values of property in that immediate vicinity prior, and also after the improvement was made?

A. Why, I know what property sold for previous to the time, or about the time that it was made.

Q. Do you know how this property of these complainants was situated as to the road after the improvement was completed?

A. Yes, it is very much lower than the roadway. Is that what you mean?

Q. That is what I mean. I will ask you what, in your judgment, Mr. Martin, that property, assuming there were 40 acres of it, and that it had a front of 1119 feet on the street—how much it was worth in cash just prior to the construction of that improvement?

A. That is a question that it is not possible to answer probably—definitely, at least.

Q. Haven't you any opinion as to what it was worth—any judgment? I am asking for your judgment.

A. This particular piece of property, being as low as it is, at least most of it, if not all of it, and it would be a difficult piece of property to subdivide into lots, and for that reason it would not be worth nearly as much as the property a little further east, and higher, and for that reason it is difficult, or more difficult, to put a valuation on that property than it would be on the property that is higher, which is better adapted for residence property.

Q. Still, haven't you an opinion as to what it was worth in dollars and cents prior to the improvement?

A. Yes, it might be worth four or five hundred dollars an acre, maybe six hundred dollars an acre.

Q. Take a strip along the front of this property 250 feet deep or wide, and 1119 feet long, what was it worth in cash, market value, before the improvement?

A. Again, it is difficult to put a value on that property situated as it is. It might have been worth—it is almost impossible to state what that property was worth at that time situated as it is.

Q. Was the strip worth any more per acre than the whole of it was worth, before the improvement?

39 A. Yes, it probably was.

Q. How much more?

A. Per acre?

Q. Yes.

A. I could tell better if I knew what it would cost to fill it, but I have no idea what it would cost to fill the ground.

Q. I am asking before the improvement—before anything was done.

A. Well, previous to the improvement there, there had been a demand for real estate which gave this property a fictitious value, a value that I don't believe was the real value, and there was only one sale of lots, as I understand it out there, one or two, either then or afterwards; there were acreage sales there running from a thousand dollars up, but this property being low property, was not in the market at these prices; it wasn't worth that to the people who were buying, and it is a question as to what its value was—whether it was worth four, five or six hundred dollars an acre. It would largely depend upon what it would cost to fill it so it could be subdivided into lots.

Q. Can you give an opinion as to what the same strip was worth

after the improvement was made? I mean immediately after the road was improved by the asphaltum pavement and side drives?

A. It would be very difficult work because there has never been any sales out there, being low ground as it is.

Q. If you have any judgment whether based on sales or simply your judgment, I wish you would give it?

A. It is very difficult to base values, without there are sales somewhere in the vicinity. There has been no demand whatever for that property on Broad street.

Q. You knew of sales after the improvement was made on the hill?

A. Yes, that is a different character of property.

Q. Considering the character of that property, and comparing the character of this property with that, or taking the selling price of that property, what, in your judgment, was it worth after the improvement was made?

A. I should suppose, after the improvement was made, based on sales made at that time, that property might be worth $40 or $50 per foot front.

Q. Considering the differences between the characters of the property?

A. Simply estimating what it would cost to fill it so that
40 the lots would stand quite a little distance above the roadway.

Q. What properties were sold after the improvement was made?

A. The property that was sold to Mr. Tracy, or Col. Patton, I don't remember which, they both owned the property; and the Van Horn property.

Q. What was the size of their property?

A. I think it was 100 feet lot, sold at $7500. $75 a front foot.

Q. Two lots?

A. I presume it was, two 50 foot lots fronting on Broad street.

Q. Do you know the depth of the lots?

A. I think 175 feet.

Q. What about the sale of the Stansberry property?

A. That property is some distance further out, and if I remember correctly sold for $1100 per acre.

Q. You mean it is east?

A. Quite a distance east of the Tracy lots.

Q. It is still along this improved road?

A. Yes, it is the east tract of property that was bought.

Q. On the north side?

A. Yes, sir; running up to—or at least the Stansberry property, as I understand, runs up to the Cassidy road.

Q. How many feet altogether?

A. I don't remember.

Q. 557 feet, or do you know?

A. I don't know; I never did know.

Q. How much was the grade of the road above this property of the complainants after the improvement was finished?

A. I never measured it, and I don't know.

Q. I will ask you in your judgment, what special benefit was derived to that property from the improvement?

Question objected to by counsel for defendant for the reason that it is asking for a conclusion.

A. I believe that the entire property was—the property east of Alum creek was benefited to a certain extent by the improvement, but it seems to me it was a very great mistake to put down as expensive a road as that was. A very much less expensive road would have benefited the property to the same extent, I think. Or if not so much, very nearly so.

41 Cross-examination.

Examined by Mr. DYER:

Q. You spoke, Mr. Martin, of the Stansberry property. At the time of the sale that property was not in lots, was it.

A. No, in acreage.

Q. And the price you named was for the property in the whole, or per acre?

A. It was a divided interest of the property they retained, I think, one-half of what they held.

Q. Do you know how deep it was?

A. No, I don't.

Q. It was more than the depth of an ordinary lot, wasn't it?

A. It was probably a thousand or more feet in depth.

Q. The price that you named had no reference to the front foot on Broad street?

A. No, sir.

Q. You consider the property immediately abutting on Broad street as of more value than you do the property extending back of the Stansberry residence?

A. Yes, there is no question but what Broad Street estate is worth more than lots in the rear.

Q. You spoke of the property of complainants being worth four, five or six hundred dollars prior to the improvement as it then stood; what was it a front foot?

A. If 1100 feet, and you figure per front foot, it would give you it quicker.

Q. You give the estimate front foot.

A. That was simply for a certain depth.

Q. For a certain depth for a front foot. You did not give it per front foot.

A. I qualified my statement with reference to the value at that time by basing it on what it had been selling for.

Q. Basing it on the same basis gives it by the front foot, what you consider it worth before the improvement was made—so we can get at it.

A. You mean just previous and during that time?

Q. Yes, give me that.

A. Well, there was no marked difference in property per foot front on Broad street at that time, so far as I knew about it.

Q. You gave us an estimate at four to six hundred dollars per acre prior to the improvement; can not you do that in frontage—put that in front feet in your judgment?

42 A. I don't believe it is possible to do so, because there was no demand for any land there in that way previous to that boom and it is impossible to say what 250 feet lying in that hollow would have been worth at that time.

Q. Your estimate was that the 250 feet abutting on this improvement was worth at least four to six hundred dollars per acre.

A. Running back through the rear, yes.

Q. What would you say as to the 250 feet per acre prior to the improvement?

A. I would say that the Broad Street frontage there would be worth anywhere from $800 to $1200, possibly $1500 per acre.

Q. Before the improvement?

A. Before the improvement.

Q. Well, now, what after the improvement? Give us that.

A. I gave that.

Q. 40 or 50 per foot front?

A. Yes.

Q. Now, Mr. Martin, what was the property belonging to complainants worth per acre before the boom as you call it, say from '85 to '88?

A. I should think it would have been worth $200 or $300 an acre.

Q. Now, what do you estimate it per acre after the boom, and after the improvement was made, after the boom and about the time the improvement was made?

A. You mean previous to the time the improvement was made?

Q. During the boom—the improvement was made in '90.

A. I should think that the property might have been—the market value, considerably more than 2 or 300 per acre previous to the boom, but in my judgment that land is not worth to-day——

Q. No, that won't do; I am not asking your judgment to-day—your judgment in view of recent occurrences, or anything of that kind, but as you are acquainted with the market values prior to the boom and during the time this improvement was made?

A. I understood I was answering that; I am giving you my judgment.

Q. Let us confine ourselves to that period, leaving the period subsequent to that time out of consideration. You can always look back, you know. I want to know, prior to the boom, your judgment of the value—prior to the boom, of the property of the complainants?

43 A. I think I have given that—from $200 to $300 per acre.

Q. What, in your judgment, was the market value of the

tract, of this same property, during the boom, and during the time this improvement was being made, up to the time of its completion, in October, '91?

A. Why, I have practically answered that question—I believe it was worth from $400 to $600 per acre.

Q. Judging from what their property sold per front foot was the property per front foot belonging to complainants worth over $40 to $50 per front foot?

A. It might have been worth about $40 per foot front—simply an estimate on what it might cost to fill it up.

Re-direct examination:

Q. What did you say was your opinion—your opinion is not what?

A. I wish to say that I don't really believe that because a man paid $75 per foot front for that 100 feet, the land in that neighborhood would be worth $75 per foot front; in my judgment, and going on that basis, I don't believe it was worth that; I don't think that that which was sold was worth $40 per foot front.

Q. You mean the complainants' land?

A. Yes, in the condition it was in. But it is difficult for me—for any man to state what that property is worth, or was worth in so many dollars at that time. That is what I mean to say, and I was simply basing my opinion on what had been done by some one else, just using a basis upon which values are placed.

Q. You said you did not know the front of the Stansberry property—how many feet there were?

A. No, I don't.

And also CHARLES MCLEISH, a witness produced on behalf of plaintiff, who being first duly sworn, testified as follows:

Examined by Judge D. F. PUGH:

Q. Give us yonr name, residence and occupation?

A. Charles McLeish; Mifflin township; ice man.

Q. Are you one of the complainants in this case?

A. Yes.

Q. What proportion of the land which is—on which the assessment is ordered, do you own?

A. One-third.

44 Q. Who owns the other thirds?

A. Dr. Shepard and Leonard Carr.

Q. Do you mean in the suit I am asking about?

A. Yes, sir.

Q. Since the suit was brought has there been any change in the ownership of the property, and if so, what is it?

A. Yes, Leonard Carr sold out.

Q. To whom?

A. To Thomas McLeish and Joseph Busch.
Q. What relation is Thomas McLeish to you?
A. My son.
Q. You had no interest in that purchase?
A. None whatever.
Q. What use, or uses, have you devoted this property to since you owned it?
A. Ice purposes only.
Q. No farming?
A. No, sir; they garden it some, a little, but I use none of it and get no benefits from it.
Q. I will ask you whether you signed the petition for the improvement of the Columbus and Granville road in front of this property?
A. To my best recollection I believe not. I won't say positively, but I think I didn't sign it.
Q. Do you know whether it was signed by either Dr. Shepard or Mr. Carr?
A. I think Dr. Shepard signed the petition.
Q. For himself or all three?
A. All three; I don't believe I signed it, but I won't say positive.
Q. If he signed for all three it was with your authority?
A. Yes, sir.
Q. I will ask you what in your judgment was the value of that property prior to the construction of the improvement of this road in front of it? First, of the whole tract?
A. I should think 4 or 5 hundred dollars.
Q. Four to five hundred dollars what—per acre?
A. Per acre as a whole.
Q. What was the strip along the front of it 1119 feet long, and 250 feet worth in cash prior to the construction of the improvement?
A. Well, I should think not over seven or eight hundred dollars.
Q. What, in your judgment, was the whole tract worth immediately after the improvement was completed?
45 A. Putting that as a whole?
Q. Yes, first as a whole, I asked.
A. I don't know hardly how to answer that question.
Q. I am asking now the value of the whole tract after the improvement?
A. I should say $100 an acre. It is wild, of course; we have never had a front foot property there.
Q. Do you mean it was worth $100 an acre more after the improvement, than it was before?
A. Yes.
Q. I will ask you what, in your judgment, was the cash market value of the strip I inquired about, after the improvement?
A. I would have to admit it was worth more, but I can not tell you how much.

Q. How much, in your judgment, in dollars and cents?
A. How much more, or for the acreage?
Q. You can give it in the abstract, or by comparison.
A. Say one thousand dollars an acre after the improvement.
Q. Do you mean it was worth one thousand dollars more after the improvement than it was before?
A. Yes, a thousand dollars per acre more after the improvement. Seven or eight hundred dollars per acre before, and one thousand dollars after.
Q. What was the grade of this property as compared with the grade of the road or street after the improvement was finished?
A. They raised the street—raised the fill on that property probably 18——
Q. Along the 1119 feet?
A. Nearly so, to the east line, and probably past it.
Q. And how much was the grade of the street above the level of the property?
A. I should think 10 or 12 or 14 feet.
Q. Was it that way along the whole front where the street was left?
A. Pretty much to the eastern line.
Q. I will ask you what, if anything, you and your co-owners did towards filling up this property with dirt.
A. We put in nearly 70,000 yards of dirt there at an expense of nearly $5,000, if not quite.

Question and answer objected to by counsel for defendant.

Q. For what purposes did you make this filling?

Question objected to by counsel for defendant.

A. They raised the road higher than it was, and it was considerably lower than before, and it was necessary to have that much dirt.

46 Answer objected to by counsel for defendant.

Q. Do you know how much has been paid on the assessment?
A. I don't.
Q. Do you know how many acres there would be in a strip 1119 feet long, and 250 feet wide or deep?
A. I believe about 6½ acres.
Q. What sort of a highway is this on which this property abuts?
A. It is asphalt and has two side drives.
Q. To what extent has it been traveled since the improvement was made?
A. It is a very prominent thoroughfare, traveled considerably.
Q. Used by people of the city and country both?
A. Oh, yes, sir.

Cross-examination.

Examined by Mr. DYER:

Q. Mr. McLeish, of your own judgment do you know whether or not there was any claim for damages made to the board of county commissioners of Franklin county on account of the raise of grade, or change of grade on account of the construction of this improvement?

A. I am not familiar with anything.

Q. Did you ever make any claim for damages on account of the change of grade?

A. We did at the time, but did not succeed in doing anything.

Q. Did you file any papers?

A. No, sir.

Q. With the county surveyor?

A. No, sir, only in a verbal way so far as I am concerned.

Q. You never understood of any claim being allowed on account of or by reason of the change of grade?

A. I didn't only in a verbal way.

Q. Prior to the time this improvement was made, what was the extent of the grade in front of your property?

A. That is by the pond?

Q. Yes.

A. Ten or twelve feet, I should judge.

Q. It has a fill on each side?

A. Yes.

Q. It runs through a fill and water will get on to it. What was the increase?

A. About two feet; they raised the grade of it.

47 Q. They made the improvement and raised the grade of it about two feet?

A. Probably that.

Q. There was no material injury?

A. They raised the road that much.

Q. In raising the grade two feet you had a grade of 16 feet?

A. Had a grade of ten or twelve feet, and they raised it two more.

Q. Grade of ten or twelve feet, and they raised it to fourteen?

A. About that.

Q. That was the only change made?

A. They refilled it that much, in my opinion.

Q. Did Alum creek overflow that grade as it existed before the improvement during times of high water?

A. Not to my knowledge.

Q. What use, if any, did you make of that embankment?

A. Harvested ice on the enclosure there.

Q. What use did you make of this land before this improvement was made?

A. Didn't use it at all, except for ice. We did when in the ice business.

Q. Did you use the embankment that was made by this road as an embankment for this pond?

A. The bank that was there was allowed to remain, and afterwards we filled in over 75,000 yards of dirt.

Q. Then you did use prior to the improvement, the bank to the road as a bank to your ice pond?

A. Yes.

Q. Since that time you have continued to use it?

A. No, sir, we made our own bank.

Q. That was the extension of this bank?

A. Yes, sir.

Q. Up to the time you made your own, you used this bank, did you?

A. Yes, sir.

Q. How much of the fill did you make?

A. 250 feet.

Q. You filled up the property 250 feet from the Broad Street improvement?

A. Yes, sir.

Q. Did you fill it to the full height of the grade of the street?

A. No, sir, it is not filled yet.

Q. How nearly filled is it?

A. It wants as much more as it has had.

48 Q. What do you consider—you said you considered the value of the property prior to the making of this improvement at what?

A. In the frontage or the acreage?

Q. By the frontage.

A. I said seven or eight hundred dollars an acre.

Q. That is the 250 feet?

A. Yes, sir.

Q. Now, have you ever had any offers to purchase this property?

A. Have I had any offers to sell the property?

Q. Yes.

A. No, sir.

Q. Had you any offers to sell at the time the syndicate was purchasing the property?

A. No, sir.

Q. Have you subdivided the 250 feet?

A. No, sir.

Q. Mr. McLeish, what difference in value is there—I mean on the 250 feet between your property and the property lying east as it is now continued?

A. That is a very difficult question to answer, as we never had a nibble for property beyond that place to place a value on it.

Q. If property is worth $75 a foot front east of you, the way you have your property now filled, isn't your property worth that much per foot front?

A. No, sir, it is not.

Q. Well, do you say that your property is worth less per foot than the property east of it?

A. Yes, certainly it is.

Q. How much?

A. It is impossible to tell, because it is very low land.

Q. I mean as it is now graded and filled?

A. It is not filled to the grade.

Q. Assuming now that you have filled it, Mr. McLeish, say that your property for 250 feet lies on an equal grade with the improvement, do you now say that your property is not worth as much as the property lying east of it per foot front?

A. It is not, because it is low.

Q. How much difference?

A. Well, I will place it on an average of $12000 per acre after it is thoroughly filled up. After the 250 feet is thoroughly filled, I believe it would be worth $1200 an acre.

Q. Are you speaking of the value of it now?

A. No, sir, after it is filled up. That is the question you put to me.

49 Q. Assuming you had made the fill equal to the grade in October, 1891, would you say now that your property was less valuable per foot front than the property east of it?

A. Certainly I would.

Q. What difference would you put?

A. Well, it is very low land after it is filled up.

Q. Give me in dollars and cents the difference in your property in that condition and the property east of it?

A. I could not do it—I could not put a value on it in that comparison. We never had front foot offers lots there.

Q. Give us the difference in your judgment in value, and your reasons for making it?

A. It is very low land, and for that reason it is only worth $1200 an acre, if it is that. I can't answer more intelligently.

Q. Mr. McLeish, you are a member of the Alum Creek Ice Company, aren't you?

A. Yes, sir.

Q. Is that a partnership?

A. Yes, sir.

Q. And it is the Alum Creek Ice Company that uses this land?

A. Yes, sir.

Q. You cultivate it in the summer time, don't you, and raise crops?

A. I raise garden truck, but I never realize anything from it.

Q. For the purpose of this improvement, who represented the Alum Creek Ice Company?

A. Why, Dr. Shepard, if I understand you right; I think the doctor signed some papers for it. I presume that is what you want to get. We were all there of course.

Q. This partnership owned this land?

A. Yes, sir.

Q. Then the signature of the Alum Creek Ice Company means Shepard, McLeish and Carr?

A. I don't know how it was signed.

Q. Well, if signed so there it would mean the three persons, Shepard, McLeish and Carr.

A. Yes, sir.

Q. If I understood you on your direct examination, Mr. Shepard had full authority for the partnership, and for yourself, at least, to sign different papers which he signed in connection with this improvement?

A. Yes, I should think that is right.

Q. I will ask you whether, individually, you at any time
50 made any objection to the construction of this improvement?

A. I don't remember that I did individually.

Q. Where did you live during the time it was being improved?

A. I lived a mile and a half north of here.

Q. Where did you put in your time?

A. In Columbus.

Q. Did you have any personal knowledge that this improvement was contemplated?

A. Yes, sir.

Q. Did you have any personal knowledge that it was guaranteed by the board of county commissioners?

A. Yes, sir.

Q. Did you have personal knowledge of its construction during the time it was being constructed?

A. Yes, sir.

Q. Were you on it and over it frequently?

A. Seen it very often, twice every week at least.

Q. Did you have knowledge at or about the time the assessment was made as to the amount of it?

A. I have the knowledge or information, that it would cost $6.00 or $7.00, is all I ever heard.

Q. When it was finally calculated and placed on the tax duplicate, were you aware of the amount?

A. No, sir, I was not.

Q. When did you first hear it was eleven dollars or thereabouts?

A. I could not tell that doctor pays the taxes and everything, and I could not—I never paid any special attention to it.

Q. He attended to the tax matters, did he?

A. He always has for twenty odd years.

Q. Did you know of the fact, Mr. McLeish, that the assessment was to be levied on the abutting property to the depth of 250 feet?

A. Yes sir.

Q. Did you at the time the improvement was made?

A. Yes, I was under that impression. That was my impression, yes.

Q. You knew it at the time it was ordered, didn't you?

A. Yes, I so understood it.

Q, You knew it was to be levied on the foot front, didn't you? On that 250 reet.

A. Yes sir.

Q. You have no objection or protest as to that method of assessing the cost for the construction of this improvement?

51 A. No, sir.

Q. You never made any objection or protest to the method of collecting this assessment until this suit was filed?

A. No.

Q. I will ask you to state, Mr. McLeish, whether or not you had knowledge that this improvement was to be made under an act of the General Assembly, passed March 31st, 1890, providing for the improvement of roads in this county outside of the city?

A. No, I wasn't familiar with the law.

Q. You say you didn't sign the petition—that is your best recollection?

A. That is my best recollection.

Q. Did you ever read it?

A. I don't think that I ever saw it.

Q. Mr. McLeish, you said in your chief examination that your son purchased a one-third interest in this property from Mr. Carr?

A. My son and Mr. Busch purchased Mr. Carr's interest.

Q. What is the age of your son?

A. Twenty-nine.

Q. Where does he live?

A. At Shepard's, Ohio, Franklin county.

Q. Is he a married man?

A. Yes, sir.

Q. And lives by himself?

A. Keeps house.

Q. He is not living with you?

A. No, sir.

Q. Had you any knowledge that your son and Mr. Busch contemplated purchasing the interest of Mr. Carr prior to the time that they did purchase his third interest?

A. A few days, yes, sir.

Q. Did you consult or talk with your son about the purchase?

A. I spoke of it in an ordinary manner.

Q. Did you know when the purchase was made, or the transaction, what the consideration was, etc.?

A. Yes, sir.

Q. I will ask you to say now if you knew what the real consideration for that purchase was, how much money didy our son and Mr. Busch pay to Mr. Carr for his third interest?

A. $10,000, I believe, to the company.

Q. For this third interest in this property?

52 A. For all the property that they own everywhere.

Q. What was the consideration given?

A. His interest in the ice business I am answering.

Q. What was the consideration for the third interest in this real estate?
A. Indeed, I don't remember; I don't know.
Q. Have you any knowledge on that subject?
A. No, sir.
Q. Do you know how the consideration for this real estate was figured?
A. No, sir.
Q. What other properties were there?
A. There was property in Fairfield——
Q. Real estate, do you mean?
A. Yes, sir, and personal properties.
Q. The ice plant, etc.?
A. Yes sir.

Redirect examination.

Examined by Judge PUGH:

Q. When did you make this fill, how long after the improvement was made?
A. Well, as fast as we could get the dirt.
Q. Within what time?
A. The same year.
Q. I will ask you whether you knew, before the grade of this road was made for the actual construction of the road, what it was going to be?
A. No, sir.
Q. Whether it would be higher than it was?
A. I did not; I was surprised when it was made.
Q. Your son and Busch were to pay $10,000 as the consideration for the interest of Car in this real estate and in their property?
A. Yes, sir, all properties pertaining to the ice interests.
Q. You don't know then what part of that consideration was to be paid for the one-third interest of Carr in the real estate on which this assessment was levied?
A. No, sir.

Re-cross examination.

Examined by Mr. DYER:

Q. Mr. McLeish, I hand you a paper marked "Exhibit B," and ask you to examine the signature of Charles McLeish, attached to that paper, and state whether or not that is your signature?
53 A. That looks like mine—my signature, is all I can say, Mr. Dyer.
Q. Well, is it your signature?
A. I could not swear to that, you know.
Q. Don't you know your own signature?
A. Certainly I don't know, couldn't somebody counterfeit my own

signature? I don't infer they did; that looks like my signature; I think it is my signature.

Q. I hand you, Mr. McLeish, a paper marked "Exhibit C," and ask you to examine the signature attached thereto of Charles McLeish, and state whether or not that is your signature?

A. That also I believe was signed by myself.

Q. I hand you a paper marked "Exhibit D," and ask you to examine the signature of the Alum Creek Ice Company, by C. McLeish, and ask you to state whether or not that is your handwriting?

A. That also looks like my signature. I repeat the same as I have in the other places. I don't know what it is about.

Q. It is about the sewer pipe.

A. The sewer pipe?

Q. Yes, sir. Did you write the words "Alum Creek Ice Company"?

A. I see that that was done by the same person that did the other writing.

Q. What have you to say as to its being your writing?

A. Why, I think I wrote it.

Q. Mr. McLeish, I will ask you to state whether or not you had authority to attach to this paper, or to any paper connected with this improvement, the name of the Alum Creek Ice Company?

A. I haven't the slightest recollection of ever conversing with anybody on the subject, so if I signed it in person, I did it of my own accord.

Q. You were one of the partners in the Alum Creek Ice Company?

A. Yes sir.

Q. As one of the partners of that company, you had knowledge of the construction of this improvement?

A. Yes sir.

Q. State whether or not one of the partners objected at any time to your act in signing the "Alum Creek Ice Company" to "Exhibit D"?

A. I don't think they objected; I don't know as they knew I signed it.

Mr. DYER: It is admitted on the part of the counsel representing defendant, that the papers marked "Exhibit B," "C" were
54 signed by Charles McLeish, and that the paper marked "Exhibit D" was signed by the Alum Creek Ice Company by C. McLeish. Further that said C. McLeish had full power and authority to sign the name of the Alum Creek Ice Company.

(Judge PUGH:)

Q. You were inquired about the consideration for the purchase of the one-third of the property from Leonard Carr by your son and Busch. Do you know what was the consideration for the $10,000 purchase price? Did you state all the consideration they received for the $10,000 purchase price?

A. No.

It was agreed by the counsel for plaintiff and defendant that Mr. Charles McLeish be excused and his son, Mr. Thomas McLeish, be called to testify.

THOMAS J. MCLEISH, who, being first duly sworn, testified as follows:

Examined by Judge PUGH:

Q. Your name?
A. Thomas J. McLeish.
Q. Are you the McLeish who, with Mr. Joseph Busch, bought the interest of Leonard Carr?
A. Yes, sir.
Q. In the property concerning which the assessment thereon is now in controversy in this suit?
A. Yes, sir.
Q. Have you the article of agreement showing the terms of the contract between you and Mr. Busch on the one side and Leonard Carr on the other?
A. Yes, sir.
Q. Is this the agreement (handing witness paper marked "Exhibit E")?
A. You mean the property that he sold, the price paid, the terms?
Q. The terms of the agreement?
A. Yes, sir.
Q. Is this the paper?
A. Yes.

It is agreed that a copy of this paper may be attached to the deposition of Mr. McLeish, instead of the original, which is done, and is "Exhibit E," and is now offered in evidence.

55 Cross-examination.

Examined by Mr. DYER:

Q. As I read this contract over, Mr. McLeish, there seems to be no stipulation as to the value placed on the one-third interest in the 39 acre lot. Can you state what value was placed—what value was agreed upon between you for this particular piece of property?
A. I cannot.
Q. How did you arrive at the consideration named in this contract?
A. Do you speak of the land particularly, now?
Q. No.
A. Well, simply like any other business transaction, figured the entire thing, and didn't consider the consideration incidentally at all.
Q. What figure did you place on these 39 acres?
A. I wouldn't state that now, that we put any figure on it.
Q. In making your estimate, and coming to an agreement be-

tween yourselves and Mr. Carr, you must have figured some particular value for this 40 acres of land.

A. I have no knowledge of that figuring at all; no particular figuring to bring it down to a fine point what that land was worth—it was for the whole thing, the ice privilege, the ice houses, etc.

Q. Isn't it a fact that you figured the land, this 40 acre lot, and the 10 acre tract near the reservoir, and the personal property belonging to the partnership on one side, and then deducted from the debts, mortgages, etc., of the Alum Creek Ice Company, and in that way arrived at the amount of the consideration which you were willing to pay Mr. Carr?

A. Yes, sir.

Q. If you did that, what was the estimate or value you placed on this 40 acres?

A. As I say, I didn't know there were any figures on arriving at that matter—that were put on that lot.

Q. What did you consider it worth at that time?

A. It is a very difficult thing; I could not answer it at this time. I don't know as I could tell, of course, we had opinions as to what the land is worth, but right now if you take what the land is worth—we figured up the assets and liabilities, and that is the basis on which we came to our conclusion.

Q. Then, after doing that you can make answer to my question—that is, what was the consideration of the 40 acres as part of the assets?

56 A. As I say I don't think we came to an actual conclusion as to what that land was worth, right down to the dollar.

Q. A rough estimate; what was it figured at? If nothing, say nothing; it was figured some way or the other.

A. I can't remember of the time that we agreed on exactly what that land was worth; we figured everything else but the land; of course that land was part of the assets, and we came to our price that way.

Q. In your deed, Mr. McLeish, you named $10,250 as the consideration for the property described in the deed. Is that correct?

A. Yes, but you find two properties in there.

Q. There are two properties, one piece consisting of about 40 acres, and another of about 10 acres, that is, a one-third interest in these two pieces. Now, how much of the $10,250 was considered for the 40 acres?

A. All but ten or twelve hundred dollars—that is for the land.

Q. Then, if I understand your answer, $9,000 would *the* about the consideration for the one-third interest which you received for the 40 acres, the consideration?

A. Let me look at the deed, please. Well, of course, you understand that on this piece of land there was an accumulation—an accumulated amount of ice, with other improvements, ice-houses and ice privileges, etc., and that was the principal thing we bought in order to go into the business. All was included in that—ice and everything else.

Q. Did the consideration then for the 40 acres include everything—the consideration including everything on it was approximately $9,000?

A. Was for all that was on it, horses, wagons, ice, ice-houses, and everything else. Of course we wanted that property, and felt it was all right, and we could get a good business there.

Q. In the deed I notice also that you assume all the unpaid street assessments pending against this property, for which Mr. Carr, your grantor, was liable, as a part of the purchase money. Did you know at the time what the amount of the street assessment was?

A. I don't know as I did, exactly, no, sir.

Q. Did you investigate, or cause to be investigated the tax duplicate of Franklin county, to determine the amount that was unpaid?

A. No, sir; I relied upon my father and Dr. Shepard for that.

Q. They told you?

57 A. I don't think it was ever mentioned; in fact, I never noticed the deed close enough to know that that was in it; but I knew that we would do anything that was right; that is understood.

Q. You understood, didn't you, at the time, that in addition to the consideration of $9,000, that you were to pay the unpaid street assessment?

A. Provided it was just, yes, sir.

Q. Well, was there any stipulation of that kind with Mr. Carr?

A. No, but we assumed these things pro and con—there were like settlements both ways that were assumed. We knew this was pending, of course.

Q. How much of the $9,000 did you consider personal property; that is to say, how much of this consideration was for ice, and ice-houses, teams, etc.?

A. It would take a few minutes to figure that.

Q. Make that estimate.

A. I would have to divide how much ice we had there and how much at Lakeside; we knew how much we had—I would have to figure it.

At this point the further taking of depositions was adjourned until nine o'clock Tuesday morning.

TUESDAY MORNING—Nine o'clock.

Met pursuant to adjournment, with same parties present.

And also EDWARD DENMEAD, a witness produced on behalf of plaintiff, being first duly sworn, testified as follows:

Examined by Judge PUGH:

Q. Give your name, occupation and residence?

A. Edward Denmead, 153 Woodland Ave. President of the Art Tile Company.

Q. How long have you lived in Columbus?
A. I have lived here about thirty years.
Q. Where did you live before you moved in to the city? Did you live anywhere near the city?
A. In Marion township on Broad street?
Q. What is that road called?
A. Called East Broad street when I lived there—when I lived on it.
58 Q. It is sometimes called the Columbus and Granville road, isn't it?
A. Yes, sir.
Q. Were you acquainted with the improvement that was made by grading and asphalting the continuation of Broad street, or the Columbus and Granville road?
A. Yes, sir.
Q. Where did you live with reference to the improvement?
A. Well, I lived right on it—right on the improvement, right where the improvement was made.
Q. Where did that improvement begin, and where did it end?
A. It began at the east bank of Alum creek, and extended out to the Cassidy road.
Q. Do you know about how long it is in feet?
A. No, sir; I don't.
Q. Did you own property abutting on this improvement, right on the street?
A. Yes, sir.
Q. How much property?
A. I owned 50 acres.
Q. When did you move away from that property to the city?
A. About '89.
Q. Are you acquainted with the property which belong to these complainants at the beginning of this action?
A. Who are they?
Q. Doctor Shepard, Mr. McLeish and Mr. Carr.
A. Yes, sir.
Q. Where is it located with reference to the improved road?
A. It abuts on the improved road.
Q. At the east end?
A. It is on the south side of the improvement, and ends at the west end of the improvement.
Q. What kind of property is that with reference to the grade of the road before the improvement was made?
A. I think that before the improvement was made, if I recollect right, it was four or five feet below the road, before the improvement was made.
Q. I will ask you whether you were acquainted with the values of lands in that neighborhood—in that vicinity, before the new road was made, as you have described?
A. I was acquainted with the value particularly before the improvement was made.

59 Q. I will ask you what in your judgment was this property of the complainants worth in cash before the improvement was made, that is to say, a strip along the front of it 1119 feet long and 250 feet wide?

A. Well, Judge, to take the value of the very land we are speaking about—that land remaining so low—I think that land at that time for building purposes——

Q. For any purpose?

A. Well, I should think that land was worth about $700 an acre.

Q. I will ask you what in your judgment was the cash value of the same land immediately after the improvement was made, immediately after?

A. Well, I don't think the cash value was any greater.

Q. Greater than it was before?

A. Greater than it was before, no, sir.

Q. Why?

A. Well, there had been a fill made there, and in order to make that property valuable, as it was still lower, to make it valuable for building purposes it would have to be filled up considerably more.

Q. Is it filled enough now?

A. No, sir.

Q. For such purpose?

A. No.

Q. What was the relation between the surface of the property of the complainants, the grade of the property, and the grade of the street—the road, after the improvement was finished?

A. If I recollect right they made a fill there of about three feet.

Q. Do you mean that they raised the grade of the street or road three feet higher than it was before, than the property?

A. Yes, higher than it was before—higher than the property. That is my recollection.

Q. I will ask you to describe the situation of the property on both sides of the road, beginning at the east end of the improvement, and going as far as the McCalla property which is next to the property of the complainants, with reference to the grade of the street after it was finished?

A. Well, it was a fill, as I say, of about three feet, and there was quite a cut up to McCalla's.

Q. I am asking about the east end, beginning with the Stansberry property out there, not coming this way, but ending with the McCalla property—I want to know what the grade was there?

60 A. That grade was lower than it was after the improvement; they made a cut and made a fill.

Q. Well, about—is the property along there—along the distance of the improved road, higher or lower than the grade of the street?

A. It is higher.

Q. How much higher?

A. I should think the McCalla property——

Q. No, immediately east of the McCalla property.

A. My property when I lived there, the property that I left, was about 2½ feet, probably, above the grade of the old road, and after the improvement was made it was probably 6 feet. About that proportion, right along.

Q. I will ask you this question: What, in your judgment, was the relative special benefit derived from the improvement *by* the property of the complainants, to the property on both sides of the improved road, beginning at the east end of the improvement, and ending with the McCalla property?

A. Well, I think Dr. Shepard's property was benefited as much as the rest of the property, if there was any benefit at all done them—if the property was benefited at all by the improvement.

Q. Why do you say that?

A. In the first place the improvement was very high, cost a great deal more than it should—more expensive improvement than I think necessary, and the value of the property could not keep up with that improvement.

Q. Well, do you base your judgment that it was less benefit to complainants' property than it was to the property at the other end of the improvement?

A. My opinion is that they all suffered about alike; some of the property might have been a little more benefited, but this whole property was certainly decreased in value by the fill. At least I think so.

Q. Are you acquainted with the Stansberry property?

A. Yes, sir.

Q. That abuts the improved road, does it?

A. Yes, sir.

Q. At the east end?

A. East end.

Q. Do you know the distance of the front?

A. Well, now, if my recollection serves me right, they had about the same as my property, altogether about 800 feet.

Q. Isn't it 557 feet?

A. Well——

Q. What is your front?

61 A. 800.

Q. What kind of a road is this, Mr. Denmead, is it a general thoroughfare?

A. Yes, sir.

Q. How much traveled?

A. Well, there is a very considerable travel there, the market people—a great many market people come in there.

Q. About how many people of the community of this county and city were benefited generally by that improvement—by the improved road?

A. That would be a pretty hard question to answer. I could not answer that. I know there was a good deal of travel there, probably traveled as much as any road out of Columbus.

Q. And in addition to the general travel along it by people living at the other end of it, was there any other travel on it?

A. Yes, a great deal of pleasure riding on it.

Q. By whom?

A. By the citizens of Columbus.

Q. When this improvement was finished, what kind of a drive did it make for the class last named by you?

A. A very handsome improvement.

Cross-examination.

Examined by Mr. SEYMOUR:

Q. Mr. Denmead, would not the benefit to the property be greater as the price would be greater?

A. No, sir; I think not.

Q. Don't you think that a street that would cost $11.25 a front foot would make a 250 foot deep strip on it more valuable than an improvement that would cost $2.00 a front foot?

A. Well, probably; the difference there is pretty great. I think it would make some difference, although I think the improvement was entirely too expensive——

Q. Answer that question.

A. Do I think that a pavement that would cost $11.25 a front foot would make more valuable a 250 foot strip than a $2.00 one?

Q. Wouldn't it make a strip abutting on that improvement 250 feet deep, more valuable than a $2.00 improvement?

A. Why, under the conditions there, I don't think it would, sir.

Q. This is just abutting the corporation line of the city of Columbus, isn't it?

62 A. Yes, sir.

Q. It would be the next property, if any other property was annexed to the city, which would be brought within the corporation limits?

A. Yes, sir.

Q. Would be used for building purposes if building was done out that far? Now, you say that the value of the abutting property does not increase by reason of the increased expense of any improvement made there?

A. Oh, no, I don't say that. I think an improvement can be made that will enhance the value of the property; in this case I believe an improvement that cost $2.00 a foot properly done would have—the property would have—you would have realized just as much out of that as with the expensive improvement, I believe.

Q. We have a case of property along which there is no improvement; an improvement is put there that would cost $11.25 a front foot; do you mean to tell us that that don't make that property any more valuable?

A. I don't think it made that particular property any more valuable than one that cost $2.00 a front foot.

Q. Did that improvement make that property any more valuable in the market?

A. No, sir.

Q. Would it sell for one cent an acre more after the improvement was put there and paid for, than it did before?

A. Yes, I think it might sell for more.

Q. For how much more per acre or front foot?

A. I don't believe that property would sell for more—I don't think it would sell for over $100 an acre more.

Q. How much was that property, after that improvement was made and paid for—would that property sell for a foot front in '92?

A. If it was paid for in '92—well, sir, in '92 I don't think that that property could have brought over $800 an acre.

Q. What was the fair market value of that property per foot front in '92 supposing that property to have been paid for entirely?

A. Per foot front?

Q. Yes.

A. I can't tell—let's see; I think it would be worth about $800 an acre. There was 210 by 210 it runs back—200 feet makes an acre—I think that property would be worth about—I should think that that property would be worth—would be figured out 200 feet at $30 a foot—I would have to do a little figuring there; it is
63 250 feet deep, and 210 square feet to an acre, and I should think that that would be worth, estimating at the acreage—that property was worth after the improvement was made, about $800 an acre.

Q. I would like to get the front feet—give us the value per foot front after the improvement was made. That is in feet.

A. I don't know by feet.

Q. Mr. Denmead, wasn't that property fronted by that improvement mere acreage property, farm property, not a property used for lots and sold by the front foot?

A. Well, I never heard of Dr. Shepard's offering them.

Q. But the property along the improvement, I am talking about now?

A. Now, they were platted so, sir. I could only say that they were so platted, so figured by the foot front.

Q. There was no plat before the improvement was made, was there?

A. I had a plat of my property made, but never recorded.

Q. After this improvement was made—the whole property abutting along the improvement, was made valuable for platting and for sale by lots?

A. Yes, that is right.

Q. The improvement made it more valuable in that way, didn't it?

A. It was valuable before that, but I suppose that improvement added some of its value, sir.

Q. Wouldn't the nearer the property would be located to the city

increase the value of the improvement to the property—such an improvement as this?

A. Yes, I should think it would add something to it, sir.

Q. That is the property at the west end of the improvement just next to the corporation line would be more improved, or made more valuable by an expensive improvement than property half a mile away, or further in the county?

A. Yes, it depends a good deal on the taste of the man that wanted to purchase.

Q. Isn't that the rule in the market?

A. Yes, that is the rule in the market.

Q. And this property of the Shepards would be increased more rapidly in value, at a greater ratio, than the property of Stansberry, located at the other end of the improvement?

64 A. That particular property would not be increased much, because in making the improvement they made a fill, and in order to get the property valuable for lots, they would have to put a great deal of expense on it.

Q. Wasn't that property down about 12 or 14 feet before the improvement was made?

A. I don't think it was, sir. Of course they excavated some east along the ice pond, but I don't think it was quite that.

Q. You say they excavated some for the ice pond?

A. Yes, they took out some dirt there.

Q. So that these complainants, these owners, had excavated this property adjoining the improvement, and made that grade deeper, before the improvement was made, for the purposes of their ice pond?

A. Yes, they did that.

Q. They already had a deep grade down to their property before they made the excavation, didn't they?

A. I don't recollect certainly; that ice pond was built before my time out there, I don't recollect just how it was.

Q. There was some grade down to it before the excavating that they made?

A. Yes, sir.

Q. That not being sufficient they made a further excavation for the purpose of the ice pond?

A. Yes, sir.

Q. Now, going back to that question as to the foot front value, Mr. Denmead, of this property immediately after the improvement, can you not give us the fair market value of that property, with this improvement along it, considering that the improvement was paid for in full in '92, just after the improvement was made?

A. Well, I speak for myself, I would not want to give over $4.00 foot front for it.

Q. You wouldn't want to give over $4.00 a foot front. Don't you know that property just east of that was sold for $75 a front foot immediately after the improvement was made?

A. Of my own knowledge, I do not, sir.

Q. Isn't that common report, and common knowledge there?

A. I believe I heard in this room that that was sold for that; but I don't know; I haven't any knowledge of it at all. I could not tell from hearsay.

Q. So, in your opinion, this property was worth not to exceed $4.00 a front foot after the improvement was made?

A. After the improvement was made.

65 Re-direct examination.

Examined by Judge PUGH:

Q. I will ask you this question, Mr. Denmead, it is leading, probably, but I would like to get your opinion: Isn't it true that all property on both sides of that improved road on the east side—east of the McCalla property, is all for building purposes?

A. Yes, sir.

Q. The improvement did not make any such change in the grade of the street with reference to the lots along each side or necessitate any such depression or elevation of the grade of the lots?

A. No, sir, except the Van Horn property that is opposite.

Q. You said something about the complainants having scraped some dirt out.

A. I said when they made their ice pond they scraped some dirt.

Q. Originally do you mean?

A. Originally, yes, sir.

Q. Did you ever hear of any more than two lots fronting on Broad street being sold by the front foot after the improvement was made?

A. I believe I heard of no property being sold there by the foot front on Broad street at all, until I heard it mentioned in this office.

Re-cross examination.

Examined by Mr. SEYMOUR:

Q. You say that property you considered to be worth about $700 an acre before the improvement was made, Mr. Denmead?

A. Yes, I think it could have been sold for $700 an acre.

Q. What was the fair market value of that property along about '88?

A. Well, about '88, I think it was worth about $700.

Q. Was that prior to the investment of the Bullitt syndicate in property out there?

A. Yes, I think it was.

Q. Didn't the investment by that syndicate raise the values of all property along that improvement about '88 or '89?

A. I never knew but one piece of property that sold for any more than that, and the syndicate bought that.

66 Q. I was endeavoring to fix the value of property in that vicinity; didn't they raise to about double at the time the Bullitt syndicate commenced to make their investments?

A. Yes, sir.

Q. Prior to the time that they came there, what was that property worth, in that vicinity, in the acre?

A. Well, I bought mine for $250 an acre.

Q. $250 an acre.

A. I had 800 feet on Broad street—yes, I had 800 feet on Broad street.

Q. Your land was filled up as high as the roadway in front of it, wasn't it?

A. About two feet higher.

Q. Wouldn't you consider your property of more value than the property of the complainants in this cause, lying down in the hollow?

A. Yes.

Q. What then makes you consider that their property was worth about $500 an acre more than yours?

A. Well, I don't think I said that.

Q. When did you buy your property?

A. I think it was about '86, sir.

Q. When did your property raise in value from $250 an acre, if it ever did raise?

A. Well, sir, it raised in my estimation, and the only absolute raise I could give, one man came and offered a thousand dollars.

Q. When was that?

A. About '88 or '89.

Q. That was the Bullitt syndicate, wasn't it?

A. That was the Bullitt syndicate.

Q. And their investment there raised the value of all the property in that vicinity?

A. I think so, yes, sir.

Q. Was there any other disposals of property in that vicinity that you know of between the time you purchased your property and the time you sold to the Bullitt syndicate?

A. Yes, the property adjoining on the west was sold.

Q. Whose property was that?

A. The Willis property.

Q. Who purchased that?

A. Mr. Callender.

Q. What price per acre?

A. $500.

Q. Do you know when that was?

A. I think I went there in '86—he purchased that after I was there about two years, I think.

Q. That was about '86, then?

67 A. Yes, I think it was.

Q. Well, now, from between the time that you purchased to the time that Mr. Callender purchased, you purchased at $250 an acre, and he purchased at $500 an acre—between these times what was the fair market value of the complainants' property lying down in the hollow?

A. Well, of course, looking at the complainants' property there

from an earning standpoint, it had earning power, it was a land speculation——

Q. The question is the actual value of the land.

A. Well, sir, I would not think that that land was worth over $200 an acre; that was the time that Mr. Callender bought his.

Q. What things operated to raise the value from $200 an acre between '86 and '88 to $700 an acre in 1889?

A. In the first place I did a great deal of improving out there myself—I did a great deal of improving on my own property, and attracted some attention out that way. I put in some drainage along there and there was a general feeling over the city looking towards that particular locality. Mr. Westwater—James Westwater—was about to purchase the McCalla property, but when the time came McCalla raised on him and he refused to take it. That is all the transactions I know of. There was a general increase of land all over the city.

Q. Was there anything done to the property of the complainants that would raise it in value?

A. No, only the surroundings would do it probably. Franklin Park helped this property some.

Q. They had beautified the property some, and they had an old road there in front of it. Wasn't there a general impression that there was to be an extension of East Broad street there, and that street was to be improved and made beautiful, and didn't that tend to elevate the value of that property?

A. We tried very hard to make a nice turnpike there, and that was all; we never intended to — any more. We thought that would add to the value of the property.

Q. Didn't every property owner along there—along that improvement, including the complainants in this case, sign a petition asking the board of county commissioners to make this improvement?

A. Not to my knowledge; I could not say, because I was not there at the time.

Q. Was that talked over before you went away?

A. No, not before I went away.

68 Judge PUGH:

Q. Wasn't there a boom in real estate in this city, especially on Broad street, about two years before this improvement was made, or a year and a half?

A. Yes; to my sorrow.

Q. What time was that; what year?

A. I can locate that from this fact, I know it was about six months or maybe a little longer that Mr. Walter Mahoney sent for me and asked for an option on my property at a thousand dollars an acre, and I declined to do so.

Q. Can you fix the year? Wasn't it in '88?

A. I think it was, sir.

Q. What kind of a boom was that?

A. It was a very lively boom.

Q. Was it a healthy boom or a fictitious boom?

Counsel for defendant objects to the question.

A. I think myself that it was a fictitious boom; it was too high.

Q. You said something about a turnpike, Mr. Denmead; what did you mean by that?

A. When Jerry Bliss lived there, Callender, Bliss and I talked about getting a free turnpike in which would make the road higher.

Q. Did you make the road higher?

A. No, sir; we never got started.

Q. Was there any gravel in the road?

A. I don't think that road was graveled. Still, it does seem to me there was an improvement made there. That is, I believe there was some improvement made of gravel—made by graveling.

Q. Wasn't that a short time before this improvement was made?

A. Yes.

Q. This asphalt was made?

A. Yes.

Q. When did Callender buy the Willis property?

A. I think it was about '88; he didn't hold it very long.

Q. He sold afterwards to the syndicate?

A. Yes, sir.

Q. Didn't the syndicate buy most of the property sold in '89—most of this property?

A. I am not sure about that; I won't say either way.

And also E. G. OREBAUGH, a witness produced on behalf of plaintiff, who, being first duly sworn, testified as follows:

69 Examined by Judge PUGH:

Q. Give your name, residence and occupation?

A. E. G. Orebaugh, 786 Oak street; engaged in the real estate business.

Q. How long have you lived in the city of Columbus?

A. About thirty years.

Q. How long have you been engaged in the real estate business?

A. About 12 or 13 years.

Q. Did you know of the improvement of the continuation of East Broad street by grading and asphalting the roadway?

A. East of Alum creek; yes, sir.

Q. You are acquainted with that improvement are you?

A. Yes, sir.

Q. Assuming that was made in the year '90 or '91, I will ask you if you know what the value of real estate in that vicinity was prior to the making of the improvement, and after the improvement was made?

A. I only know by knowledge of sales that were made at that time.

Q. You had knowledge of the value then?

A. Yes, sir.

Q. Are you acquainted with the property of the complainants in this case, Dr. Shepard, McLeish and Mr. Carr?

A. The property known as the ice property?

Q. Yes, sir.

A. Yes, sir.

Q. Were you acquainted with it at the time—at the two times mentioned?

A. Yes.

Q. What, in your judgment, was a strip off of the front of the property, next to the roadway, 1119 feet long and 250 feet deep, worth in cash just before the improvement of the road was made?

A. I presume the value there, before making the—to make an estimate on that would be by the foot frontage, and that would be very difficult for me to pass an opinion on, because the ground east was much lower than the ground further east on the elevation there, that I don't think that it had a value that the higher ground had.

Q. Taking that into consideration, what, in your judgment, was it—I mean taking into consideration the difference in the grade of the road, as to the property, and the grade as to the other property on the hill, what, in your judgment, was it worth at that time?

70 A. Well, I don't think it would have been worth more than $25 to $30 a foot.

Q. Before the improvement?

A. Yes, sir.

Q. Do you know what change, if any, was made in the grade of the roadway as to the property by the improvement?

A. Well, there wasn't very much change in front of that property, as I remember. It was filled some by the grading of the hill beyond. My recellection is, if I remember right, the old road—the old pike you see was almost as high as the present roadway.

Q. Well, excepting any fill that might have been made after the improvement was made, by Shepard, McLeish and Carr, what, in your judgment, was the value—market value—of that property after the improvement was completed; the same property?

A. The same property?

Q. Yes, this property of the complainants.

A. Do you mean to say immediately after that time?

Q. Immediately after.

A. Well, it had an enhanced, of course, probably $50 or $60 a foot.

Q. How much?

A. I would say $50 or $60 a foot; but that enhanced value I never regarded as being commensurable with the cost of the improvement.

Q. $50 or $60 a foot?

A. $50 or $60; yes, sir.

Counsel for defendant objects to the last question put to witness.

WITNESS (continuing): I don't mean to say it would increase it that much; I mean to say that it was worth probably $50 or $60 since the improvement—following the improvement, at that time.

Q. Assuming that the assessment was $11.25 a foot, that the aggregate was over $12,000, and that over $8,000 has been paid, what do you say as to whether the special benefit to this property has been paid for?

Counsel for defendants object to the question as leading, and asks witness for a conclusion.

A. Well, I think that it had been paid, that it had been paid quite to the extent of the benefits, that portion of it.

No cross-examination.

71 And also Dr. WILLIAM SHEPARD, who, being first duly sworn, testified as follows:

Examined by Judge PUGH:

Q. Give your name.
A. William Shepard.
Q. Your occupation and residence?
A. Physician; residence, Mifflin township.
Q. How long have you lived in this county?
A. Forty-seven years.
Q. Where did you live during that time?
A. Mifflin township, where I live now.
Q. When did you acquire the property described in your bill?
A. I think it was in 1878—I think 1878 or '9.
Q. Was it purchased by you alone?
A. It was purchased by me alone. I think the deed, however, is made to myself and Mr. McLeish.
Q. Where is this property situated, Doctor?
A. Situated east of Alum creek, and south of East Broad street.
Q. By what other name is that highway designated?
A. By the East Broad Street improvement, or the Columbus and Granville pike—it used to be called.
Q. How much is there of that property?
A. There is a tract of less than forty acres.
Q. You may describe the location of the property, Doctor.
A. It is immediately east of Alum creek——
Q. I mean the surface of it.
A. It was a low piece of ground, the entire property was low—it was bought for ice purposes—for the purpose of securing ice—it was bought for that purpose because it was low.
Q. You know of the road or street having been improved by grading and asphalting?
A. Yes.
Q. How much lower than the roadway, if at all, was this property before the improvement was made?

A. Well, it was 10 feet and 12 feet in some places, and eight and four, it varied—there was some on a level with the street.

Q. What difference, if any, or change, was made in the grade of the street with reference to the property abutting the improvement?

A. The west end of the street and the east end of the street was considerably raised.

Q. About how much?

72 A. Well, probably from 1 to 4 feet, I suppose.

Q. What, in your judgment, was the value of the front of that property on Broad street, 1119 feet long and 250 feet deep, just before the improvement was made?

A. Those properties, in estimating the value I estimate the cost—estimate the value of the property that is on the further end of the 40 acres, and that that is on the improvement—the improved end—the Broad Street end, and strike a balance between them, and the Broad Street property was worth $1500 by the acreage.

Q. This strip——

A. This strip 250 feet wide, I might add we paid—that in paying $250 an acre for the property as we did, we paid $250 for the acreage the farthest away, as well as for that in front, and it divided into a front and back part; the front part was worth $1500 an acre.

Q. How much, in your judgment, was that same piece or strip of land worth in cash immediately after the improvement of the road was finished?

A. I don't think that it could have been sold for any more, or but a little more than $100 an acre after the improvement was made. It was lying too low to be salable.

Q. How much was it worth then?

A. That strip might have been worth $1700 an acre 250 feet wide—$200 added to the original value.

Q. What was the share of each of the complainants in that property?

A. One third each.

Q. How was the property on the east end of this road—this improved road, say the property along a distance of one-half of the improved road, how was it situated with reference to the roadway after the improvement was finished?

A. It was much more largely enhanced in value than the lower end.

Q. How was the grade with reference to the property?

A. The street was depressed, and the land was elevated almost all the way.

Q. I will ask you what you and your co-owners did, if anything, after the improvement was made, or about the time it was finished, in the way of filling up this land for a street?

A. We put a great deal of dirt and money into the ground after the street was made.

Q. How much did that cost you?

73 Question objected to by counsel for the defendant on the ground that the same is immaterial, irrelevant and incompetent.

A. $5,000, and maybe more.

Answer objected to by counsel for defendant, and the motion is made to strike the same from the record on the ground that the same is incompetent and irrelevant.

Q. That is in addition to the assessment you paid?
A. This is in addition to the assessment.
Q. Did you sign the petition for the improvement addressed to the county commissioners?
A. Yes.

Question objected to by defendant's counsel on the ground that it is not part of the complainants' case.

Q. Do you recollect whether you signed your individual name, or signed the names of your associates—your associate owners, also?
A. I signed the Alum Creek Ice Company and my own name, I think.
Q. Did you know before the grade was actually constructed on the ground that the grade of the roadway above your property was to be increased by the improvement?
A. No, I didn't.
Q. Do you know when the improvement was finished, Doctor?
A. I have no absolute recollection.

Cross-examination.

Examined by Mr. DYER:

Q. Doctor, did you mean to say in your examination in chief that you considered the property abutting on the Granville pike at the time you purchased this property, as being worth $1500 per acre?
A. I considered—the property advanced to value; we paid 250 for the entire tract of 40 acres; we took a great deal of land away from the Broad street; when separated into strips 250 feet in width—in 1888, being near the city, I considered it worth $1500 an acre for building lots, and for lots that are on Broad street I considered it more desirable than any other similarly situated.
Q. When did you buy this property?
A. I think it was in 1878.
Q. At the time you purchased this property in 1878 or '9, what value did you place on the strip 250 feet deep and abutting on the Granville pike?
A. I never had any occasion to estimate it. Never divided it into strips.
Q. In determining the value of the tract which you purchased, you consider the entire tract?

74 A. I considered the entire tract in the purchase.

Q. And the market value of the entire tract in your judgment at that time was $250 per acre, was it?

A. Yes, sir.

Q. Did you use that for ice purposes only?

A. Bought it for the purpose of making a pond, artificial lake and freezing ice.

Q. You used the embankment of the Granville road for an embankment for your ice pond?

A. Yes, there was an embankment of ten feet or such matter, and we used a small part of it for the embankment of the lake.

Q. Did you level your embankment?

A. We never leveled the embankment there.

Q. What change, if any, did you make to the bridge of East Broad street from Alum creek?

A. We never made anything; I don't think we even excavated anything; we never excavated up to the road—that embankment, the south end, south of the 40 acres, made an embankment. Too shallow for any use, the water came up to the Granville road, but barely touched the road, but came in here and there; we never got any headway there.

Q. I will ask you to state if you didn't excavate of a portion of the lot at least?

A. We excavated dirt—it was unsightly—it tended to make the land unsightly and we didn't want to make it more unsightly, and we didn't excavate any more.

Q. How near to Broad street did you excavate?

A. I suppose to within 100 feet of Broad street.

Q. How much did you excavate the first year?

A. Very little, because we—we scraped it off and leveled it, not enough to ever make any ice there. We never cut any ice next to Broad street.

Q. You did excavate it some; give us an estimate of the amount within 250 feet of Broad street?

A. At 200 feet we may have excavated a foot; 250 feet we may have excavated a foot and a half; at Broad street we did not excavate at all.

Q. Well, have you ever excavated any part of that land since that time?

A. No, no, we filled it up since that time. Filled that up and more too.

Q. Doctor, before any filling was done there, what did you estimate that property worth per acre?

A. We put expensive improvement on the property.

Q. Irrespective of the improvements?

75 A. We never proposed selling it, and never put any estimate upon it until the question of this improvement was sprung upon us.

Q. Well, what was your estimate?

A. The estimate, I think, was at least $1500 an acre upon 250 feet.

Q. What was your estimate on the parcel?

A. Well, $100 an acre, perhaps, I don't know—I only say—that was a hasty reply, $100 an acre to go in as farming land; $100 an acre; I don't know——

Q. When did you put this $1500 estimate on 250 feet?

A. As soon as we had occasion to put it on.

Q. When was that?

A. When this improvement was made.

Q. When it was in contemplation? It was after it was contemplated, wasn't it, Doctor?

A. The whole thing had an indefiniteness about it; we never talked it over together what that acreage was worth.

Q. Give your opinion now. When did you come to the conclusion that that was worth $1500 an acre, the frontage?

A. When property began to sell $1000 for the 50 acres.

Q. That was just before or at the time the improvement was made?

A. That was before the improvement was made.

Q. It was in contemplation?

A. I don't know only what they told me; I don't think that street was contemplated; I didn't contemplate this street when property was selling at $1000 an acre. When land was selling at 40 and 50 acre tracts at one thousand dollars an acre.

Q. When you put your value of $1500 on the frontage of that property—of your property, this improvement was in contemplation, was it?

A. The purchase of land was in contemplation, but the Broad Street improvement was not to my knowledge in contemplation.

Q. What caused, in your judgment, the value of that property abutting in the Granville road to increase in value from $100 an acre as farm land to $1500 an acre as frontage on that improvement?

A. You refer to my property?

Q. Yes.

A. I didn't say $100 for farm land abutting on Broad street; I said if 250 feet was taken off the front on Broad street, the balance can be considered as farming lands.

Q. Is your property along upon it used for the same purpose, flooded by water and used for ice purposes to the Granville road, the 15 acres——

76 A. 17 acres of it was flooded.

Q. Wasn't the part of your property next to the Granville road used for farming purposes, and also flooded by water up until this fall, which you have made ice upon?

A. I have got property that I ask——

Q. Wait a moment. I expect an answer to the question, and then you can make an explanation.

Question read.

A. What is used for farming purposes I might ask? We didn't use it for farming purposes.

Q. Tell us what you used it for?

A. We used it for driveways and approaches to our business, for fences, for building houses or driveways, and for fences and for business.

Q. Was it any more valuable for that purpose than for flooding and farming purposes?

A. Its location made it valuable.

Q. How much more valuable then was the property next abutting on the Granville road, as used, than the balance of your property?

A. $1400 an acre more than some of it.

Q. That was, you say, prior to the construction of this improvement?

A. Prior to the construction of this improvement.

Q. For how long prior?

A. Well, now, you come again to indefiniteness. We never discussed among ourselves the value of the property; it never sold.

Q. At the time you purchased this property did you consider that that strip of 250 feet south of the Granville road—south side—was worth $1500 an acre?

A. At that time I would have considered it worth $1000 an acre.

Q. And how far distant from the Granville road?

A. 250 feet.

Q. When?

A. I put $1000 an acre of 250 feet and back of that would be adjoining the pond 150 an acre.

Q. Do you know, or have you any knowledge of any property within 250 feet of the Granville road selling for a thousand dollars an acre, from 1878 to 1881?

A. There never was any put on the market for 250 feet in depth; never was sold; never put on the market.

Q. Do you know of any property that was along there that sold at $1000 an acre 250 feet from the Granville road during these years?

A. I never knew—there wasn't any offered for sale, or offer
77 to buy a tract of 250 feet in width. There was 20 and 40 acre strips of land sold at $1500 an acre going back one-third of a mile.

Q. You bought this as low as it was for 250 an acre in 1878?

A. Yes.

Q. To be used for a special purpose?

A. Yes.

Q. That is, to make ice?

A. Yes.

Q. Would you have paid $250 for that property for farming purposes, or for any other purpose than for the making of artificial ice?

A. Wouldn't have bought it at all.

Q. It wasn't worth it?

A. Yes, it was worth it; if it wasn't worth it we could have bought it for less.

Q. The land which you own now wasn't worth $250 in 1878 per acre, was it, only for ice purposes?

A. It was worth that; the man who owned it had no idea that it was valuable for ice purposes; he didn't know it was valuable for ice purposes or that it was bought for special purpose when he sold for 250 dollars an acre; we wanted it for a special purpose, and had to give his price for it, from his standpoint.

Q. In 1890—1889 and '90, what did you consider your property per acre worth, the entire period of time spoken of? The entire footage spoken of?

A. The entire footage was worth in 1889–'90—I consider it worth—well, I consider the whole tract worth as a—do you mean the whole—do you mean as 40 acres?

Q. Yes.

A. I consider it worth $500 an acre; in a strip that wide, 250 feet strip, I should put more value on it.

Q. And why?

A. The nearness to Broad street; if the whole property advanced in value, the front would advance the same.

Q. You say you think the first 250 feet would be worth $1500 an acre at the time that improvement was promulgated?

A. Yes.

Q. What gives the increase in value of that strip?

A. The advance in value of the property.

Q. By reason of the improvement, was it?

A. In one sense the improvement injured it, by raising the grade of the road—it injured it.

Q. But a moment ago you said the value went up to $1500?

A. I say it advanced $200 by the general advance in property.

78 Q. Wasn't that produced by the improvement—the general advance in the property?

A. It may have been by the general advance and the improvement—real estate—there was a damage to the property by the improvement; there was a little advance to the property by the improvement.

Q. You say that the improvement out there increased probably the value of the property down in that vicinity $500 an acre?

A. No, I didn't say that.

Q. Say a thousand or fifteen hundred?

A. I say—I didn't reply to any such question as that.

Q. Isn't that the fact?

A. Before the improvement was made there was no improvement there, and it sold for $1000 and $1200 a half mile east of there.

Q. After the improvement you asked $1500 for this? You considered this worth $1000? You considered yours worth $1000?

A. I considered ours worth, the 250 strip, $1500; when I began to divide the strip this value——

Q. In connection with the improvement?

A. Before the improvement when they were selling the land——

Q. You know they contemplated the improvement?

A. Didn't know that there would be asphalt pavement out there; they attempted it from time to time. If they wanted to make a success of that property there and sell it, they expected to improve, and I suppose in that advance that was going on we had some definiteness among ourselves.

Q. And Broad street was the street to be improved, expected to be improved?

A. The improvement on Broad street—about three years before this property was sold, they made an effort to improve it out east of Broad street—William Wall was one of the commissioners, and they made an improvement there and they criticised them, out between the creek and the Cassidy road; that advanced the value of the property some. That was before the syndicate thought of buying.

Q. Now, Doctor, didn't you contemplate the improvement of Broad street as a part of your valuation of $1500 per acre?

A. I think, as I stated, I didn't know that Broad street was to be further improved.

Q. You don't say now that you did not contemplate the improvement of Broad street in that valuation, will you?

79 A. If Broad street was taken away to-day—the asphalt taken away, and it is not a good street——

Q. Answer the question. I would like to have you answer the question for me.

Question read.

A. Not in its present form.

Q. You assume the improvement of Broad street in the valuation of $1500 per acre?

A. I can not say that I do; it wasn't necessary to consider the value of the improvement of Broad street. The property was all improved; had been sold for ten or twelve hundred dollars an acre.

Q. Will you say that you did not contemplate the improvement of Broad street as a part of the valuation of $1500 on your land?

A. Yes, I will say I didn't consider it; it was a thing we didn't need to consider. I had no idea that I considered the improvement of Broad street.

Q. How does it come, Doctor, that in 1889 and '90, you, together with the syndicate and others that owned property out there, became interested in the improvement of Broad street?

A. The proposition was suggested to the syndicate or agent.

Q. Who?

A. John Mitchell; I didn't wish to stand in the way of an improvement.

Q. Well, did you at any time appear before the board of county commissioners with reference to the improvement?

A. I think not.

Q. You never did?

A. I think not.

Q. Now, in signing the petition for this improvement, you—did you sign for the Alum Creek Ice Company?

A. Yes, sir.

Q. And for the members of your partnership?

A. Yes.

Q. And for the individuals that owned an interest in this real estate?

Q. You had full authority to act?

A. Yes.

Q. You signed the petition?

A. Yes.

Q. Both for yourself and associates?

A. Yes.

Q. You knew at the time the manner in which the petition prayed the commissioners to improve the street, didn't you?

80 A. Yes.

Q. Several ways were suggested, were they not?

A. I think very likely that different characters were suggested in the petition—different courses were suggested. I think it was.

Q. And you filed the petition praying the county commissioners to procure bids for the different character of improvements, didn't you?

A. I think that was so.

Q. You also in your petition asked the commissioners to improve the road under the law which was recently passed?

A. Yes.

Q. To improve roads outside of cities?

A. Yes, I am aware of the law.

Q. That law was passed by the legislature March 26th, 1900; you were aware of the law at the time?

A. Yes sir.

Q. And your petition asked to have the improvement constructed under that law?

A. Yes; I supposed the law was all right.

Q. Now, you asked also in that petition to have the assessment made by the foot front on the strip 250 feet deep; that was your understanding of the territory that was to be assessed to pay for the improvement?

A. I think the law—I supposed it would be done according to the law, and I think the law read by the front foot, but I never had anything to do with that part of it.

Q. It was your understanding at the time that you filed the petition with the board that the assessment, when made, was to be made by the foot front, and on the strip 250 feet deep?

A. I supposed it would conform to the law; I saw by the law it was to be assessed by the foot frontage; nothing was said in the petition that I knew of.

Q. Did you have knowledge at the time of the provisions of that law?

A. I have knowledge of the requirements of the law—whatever was in the law.

Q. Did you read the law?

A. Yes, sir.

Q. Then you knew at the time you filed your petition with the county commissioners that after the improvement was made the cost of it was to be assessed by the foot front on the territory of 250 feet deep on Broad street. Is that right?

A. I suppose it would naturally follow that if I read the law I would know what the law said.

81 Q. Outside of your reading, Doctor, did you know, as a matter of fact, at the time this improvement was made, that that was the taxed territory?

A. Not outside of the reading of the law, I didn't; from the reading of the law I knew it was to be taxed so and so.

Q. From the reading of the law it was to be taxed 250 feet on either side?

A. From the reading of the law.

Q. That is your understanding?

A. Yes, sir.

Q. Doctor, after the filing of the petition your company and the individuals composing it were notified duly, were they, of the filing of the petition, and of the hearing before the board of county commissioners, concerning the granting of the request contained in the petition?

A. If I depend upon my memory, there are many things I don't remember.

Q. You knew that there was such a hearing?

A. Presumably I did.

Q. And that the improvement was granted?

A. I can't say if I did, because I depend upon memory; I take it as a matter of fact that these things are in legal form, or when I became a party I knew it; but as far as memory is concerned I don't remember.

Q. You knew at the time when the improvement was granted?

A. Oh, yes.

Q. And you knew what the character of the improvement was to be—that it was to be an asphaltum improvement?

A. Yes, sir.

Q. You knew also that there were to be side drives?

A. That followed afterwards.

Q. You knew at the time of the changes?

A. That wasn't contemplated; that wasn't a part of the plan when the improvement was commenced.

Q. When was it made a part?

A. Well, as the improvement progressed new ideas were sprung upon the parties, and that was one of them.

Q. You knew about it?

A. I knew as the improvement progressed, I knew about the changes that were proposed, and finally entered into.

Q. Isn't it a fact that that was a part of the original plan?

A. I think not; the asphalt you mean, or the side drives?

82 Q. The side drives and sodding between the trees?

A. I think not, I think the original—I don't think that was in it at all; I don't think so.

Q. You are not sure about that?

A. I don't think it was; that was an after consideration.

Q. You knew, did you not, at the time the estimated cost of the improvement?

A. Yes, I knew at the time the estimated cost was $7.25 a front foot, to be exact.

Q. Did you not at the time that the commissioners visited the road and made an estimate of the value of the property on either side; $20 per front foot before the improvement was made, and $40 a front foot after the improvement was made?

A. I don't know about that.

Q. Did you hear of that at the time?

A. I don't remember hearing of it; I certainly never heard of the 40. I don't think I heard of the 20.

Q. At the time this improvement was granted, was there any meeting of the property holders to determine the proper persons to act as a road committee?

A. I don't think there was.

Q. You were appointed one, were you not?

A. Yes, I was appointed.

Q. Did you serve?

A. Yes, sir.

Q. Who had the authority, of any one, as a representative of that committee?

A. We were authorized to name a superintendent, which we did.

Q. Who was that?

A. Mr. Lunn.

Q. J. C. Lunn?

A. Yes, sir.

Q. He was one of your board?

A. He might have been; I couldn't say. He was superintendent. I could not say about that; I have forgotten.

Q. You authorized him to act for you, and in your behalf?

A. He acted as superintendent. It wasn't in my behalf; he was superintendent of the road. We were authorized to name a superintendent; that was all the commissioners had to do.

Q. Were you over the road?

A. I was over the road—I wasn't over the road as an observer; I made no remarks nor criticisms; I only inquired of some

83 that I thought knew how they were getting along.

Q. Did you- board meet at different times?

A. Never met.

Q. Did you join with other property owners in making suggestions?

A. I tried to get that grade down in front of our property, is all.

Q. Didn't you participate in a certain application for changes from the original plan?

A. I don't know that I did. Very likely I did.

Q. Dr. Shepard, I will ask you to state whether or not you remember of a certain application being made to the board of county commissioners by the Columbus Land Association, and presented by Eugene Powell, an agent, for permission to remove the earth in the circle in East Broad street?

A. Yes, I think I did.

Q. You remember that?

A. Yes.

Q. I will ask you if you remember signing this paper on behalf of the Alum Creek Ice Company:

"COLUMBUS, OHIO, *June 29th*, 1891.

To the commissioners of Franklin county, Ohio.

DEAR SIRS: The undersigned hereby agree in order to settle all controversy about the continuation of the improvement on East Broad street to Alum creek to Cassady road, that if said work is pushed through to completion without delay that they will secure and pay the entire expense in removing all the earth upon the circle in East Broad street, and beautifying and adorning said circle.

This proposition is made, however, only upon condition that the street around said circle be completed and paved in accordance with the plat, order and contract hereinbefore made.

EUGENE POWELL,
Ag't of Columbus Land Association.

The undersigned owners of real estate abutting upon the extension of East Broad street, now being improved under proceedings by and before this board of county commissioners of Franklin county, hereby withdraw all objection to said improvement and the assessment of their said real estate therefor, on condition that
84 the foregoing agreement shall be kept by said Columbus Land Association.

(Signed) ALUM CREEK ICE CO.
F. C. SESSIONS.
REV. JAMES KEYS, *Ag't.*
MARY P. MARKESON,
Per C. E. MARKESON.
A. E. McCALLA.
WILLIAM F. MILLER.
LAKIN LOWE.
J. C. LUNN."

What have you to say now, Dr. Shepard, as to whether or not you signed this waiver?

A. In the Morrison case the paper submitted to me, signed Alum Creek Ice Company, which I recognized as my signature. If that is the paper I recognize that signature as my signature. That was the same——

Q. You recollect now of the application being made by the Columbus Land Association, and of the waiver made——

A. To have the dirt removed?

Q. Yes.

A. I think I do.

Q. Do you remember then of the waiver made on your part, on the part of the Alum Creek Ice Company?

A. As I said in previous testimony, I can not remember all these things; I can only accept what—I supposed a record would be kept, and it wasn't necessary to remember them, and consequently I don't remember that. But wherever my signature—I recognize my signature, but as a matter of memory——

Q. Do you remember independent of the record now of doing anything?

A. I remember of doing things; but the particular thing I don't.

Q. Do you remember doing anything pursuant to the application of the Columbus Land Association?

A. I remember about that certainly.

Q. But you are not willing now to say that that, the paper I have just read to you, wasn't signed by you?

A. I am not ready to say whether it was or not. I can say that papers presented to me recognize my signature any time that I sign.

Q. Dr. Shepard, do you remember of a question being raised with reference to the cancellation of the contract with Mr. Abbott for the sodding of the sides of this roadway?

A. There was something about the sodding, I think, but that goes back into memory again.

Q. I will read you this to refresh your recollection:

85

COLUMBUS, OHIO, *Sept. 2nd*, 1891.

To the commissioners of Franklin county, Ohio.

GENTLEMEN: We, the undersigned owners of lands abutting upon the improvement now about finished on East Broad street, respectfully represent that N. B. Abbott, Esq., contractor for said improvement has stated that he was willing to cancel his contract with you for sodding the sides of said improved roadways if it was satisfactory to you, inasmuch as a number of said property owners had informed him that they would rather have grass seed sown thereon. We, therefore, petition that you cancel the above mentioned contract, and we, each one for their respective frontage upon said street, will see

to it, that grass seed is sown upon said side ways of said Broad street this fall, and take upon themselves the care and charge of the same.

MARY P. MARKESON,
By C. E. MARKESON, *Ag't.*
J. C. LUNN.
F. C. SESSIONS.
WM. F. MILLER.
ALUM CREEK ICE CO.
LOGAN M. BULLITT,
Per EUGENE POWELL, *Ag't.*
A. E. McCALLA.
W. SHEPARD.
CHAS. McLEISH."

A. Yes, I think I signed that. I knew there was such a thing, but I wouldn't have remembered it if not called to my attention.

Q. You know that you signed that paper?

A. I think I signed that paper.

Q. Now, Dr. Shepard, I will ask you to state whether you have any recollection with reference to petitioning the commissioners to construct a fifteen inch sewer pipe to be laid along the east line of the premises of Albert E. McCalla, on the south side of said street?

A. Yes, when it is called to my mind, I remember now.

Q. I will read the paper marked "Exhibit D:"

"To the commissioners of Franklin county, Ohio.

GENTLEMEN: We, the undersigned property owners on East Broad Street improvement, respectfully request that you cause an 15 inch sewer pipe to be laid from the east line of the premises of
86 Albert McAlla, on the south side of said street to such a point east on said street as you may deem necessary. And that you cause a 24 inch sewer pipe to be laid on the north side of said street on the frontage of our respective property abutting upon said street. And that you further cause a suitable gutter to be made on the side next to the curb in the two outer driveways on said Broad street, and that the expense of said work be assessed against our respective property on street, the same as other expenses for making said improvement are levied and paid.

F. C. SESSIONS,
Per E. POWELL.
COLUMBUS LAND ASSOCIATION,
Per EUGENE POWELL, *Agent.*
MARY P. MARKESON,
By C. E. MARKESON, *Agent.*
JOHN R. STANBERRY,
Ag't for Stanberry Heirs.
J. C. LUNN.
ALUM CREEK ICE CO.,
By C. McLEISH.
LARKIN LOWE,
Per JAMES KEYES, *Ag't.*"

A. Now, to that extent, I suppose—I would suppose that I signed it. I do remember of something of the kind, but I can not state that I did or didn't. I don't know whether I signed it or not; I don't know anything about it. I couldn't say that I signed it or didn't sign it, from memory.

Q. You have recollection, Dr. Shepard, of such an application being made?

A. I have recollection that that property needed drainage; I have some memory of that one question—when called to my mind.

Q. And that such an application was made to the commissioners?

A. I think it was made to the commissioners. Mr. McLeish signed it, and if this is his signature he signed it.

Q. Dr. Shepard, you had knowledge at least at the time the sewers were placed in this improvement, of the fact that they were being placed?

A. Yes, I remember.

Q. Of the same?

A. Yes.

Q. Dr. Shepard, do you have any recollection of making an application, with others, to the commissioners for the exten-
87 sion of the time for the payment of the bonds from ten to twenty years?

A. Yes, I remember that; whether I signed any paper or not, I don't know, but I remember it was discussed.

Q. I will read the following paper, "Exhibit B," to refresh your recollection:

"To the commissioners of Franklin county, Ohio.

GENTLEMEN: We, the undersigned owners of lands abutting upon the improvement of Broad street east of Alum creek and to the Cassady road, respectfully petition: that you cause all bonds issued by you for the payment of the expenses of said improvement to be for a period of twenty years from date thereof. And if you can extend the time to twenty years, for the bonds already sold, the extension of time, at which they would mature would be satisfactory to the undersigned; for all of which, we respectfully petition you.

EUGENE POWELL,
Agent, Columbus Land Association.
W. SHEPARD.
L. CARR.
CHARLES McLEISH.
LARKIN LOWE,
Per JAS. KEYES, *Ag't.*
F. C. SESSIONS.
A. E. McCALLA.
WM. F. MILLER.
J. C. LUNN.
C. E. MARKESON,
Agent for Mary P. Markeson."

Did you sign this paper?

A. I did. We made an effort to get that extended.

Q. Do you now recollect the signing of that paper for that purpose?

A. I remember an effort was made to lengthen the time for 20 years.

Q. Did you appear before the board for that purpose?

A. I don't think that anyone appeared before the board.

Q. But you don't know?

A. Well, I don't know they did. The application was made but it was not extended. We tried to have it extended; we found the taxes were very heavy.

Q. Dr. Shepard, I will ask you whether or not as a member of the board of road commissioners, you did not also petition the commissioners to that same purpose?

88 A. I never as a road commissioner—I don't remember of ever doing anything whatever, except to appoint a superintendent.

Q. To refresh your recollection on that point, Dr. Shepard, I will read the following, marked "Exhibit C," which is attached to "Exhibit B," and will ask you if you signed this paper as a member of—as one of the board of road commissioners, endorsing the request contained in "Exhibit B"?

"Whereas, the property owners on the East Broad St. improvement, have petitioned the hon. board of county commissioners to take steps to have the bonds for said improvement extended so as to run twenty yeors.

Now, therefore, resolved that the board for the improvement of said street hereby respectfully request the county commissioners to do all in their power to carry out the prayer of said petition.

W. SHEPARD,
CHAS. McLEISH,
JNO. G. MITCHELL,
Commissioners."

A. I did. My recollection has been refreshed by the paper marked "Exhibit C," and I signed as commissioner hoping thereby to sanction the proposition to extend the limit.

Q. Now, Dr. Shepard, do you remember signing the waiver on account of the loss of certain papers connected with the improvement? For the purpose of refreshing your recollection I present the following paper to you for your inspection, and ask you to state whether or not you recognize the signatures of William Shepard and Charles McLeish attached thereto:

"'EXHIBIT A.'

Whereas, on the 31st day of March, 1890, a petition signed by the subscribers hereto was by us presented to the board of county commissioners of Franklin county, Ohio, praying for the improvement

of the extension of East Broad street, in this county, beginning at the bridge across Alum creek on said street and extending eastwardly therefrom to the Cassady road, which said portion of said street lies in Marion township, said county, which said improvement was in said petition prayed to be made under the provisions of an act of the General Assembly of Ohio, entitled, 'An act
89 to authorize county commissioners in counties in which there are situated cities of the first grade of the second class, to improve roads extending from such cities, and other roads or streets in certain cases. Passed March 26th, 1890." Which said petition stated with what material said street should be paved and what provisions should be made for sidewalks, gutters and other passages for carrying off the water, and between what points said street was to be improved and the kind of material of a permanent character said petitioners desired used in said improvement, and whereas said petition was signed by all the persons owning property abutting upon the portion of said street in said petition asked to be improved, said petition stating the number of feet between the termini of said improvement.

And, whereas, such proceedings were had by said board of county commissioners on said petition and in accordance with said act of the General Assembly that the prayer of said petition was granted and said improvement made in accordance with the prayer of said petition, and

Whereas, said original petition as well as other papers relating to said improvement have been lost or mislaid,

Now, in consideration of said improvement and in order that the bonds to be issued to pay for said improvement may not lie under suspicion, or remain unsold by reason of the absence or loss of said original papers,

We hereby agree that such petition hereinbefore recited was filed signed by us as herein stated and that we will not set up as a defense against any assessment upon our said property abutting upon said improvement for the payment of bonds issued on account thereof any informality arising from the absence or loss of any of said papers but agree that said improvement was legally made and constructed.

LARKIN LOWE,
By JAMES KEYES, *Ag't.*
EUGENE POWELL,
Agent Columbus Land Association.
F. C. SESSIONS

(I believe the above to be true, but "to" not remember all particulars).

C. K. MARKESON, *Ag't.*
W. SHEPARD,
For Alum Creek Ice Co.
JOHN R. STANBERRY,
Agent for the Estate of Henry Stanberry, Dec'd.
J. C. LUNN."

A. I recognize my own signature, but do not feel competent to certify to Mr. McLeish's.

90 Q. Did you sign this paper for the Alum Creek Ice Company as appears by your signature here?

A. Yes, sir.

At this point the further taking of testimony was adjourned.

TUESDAY, *June 5th*—Two o'clock p. m.

Met pursuant to adjournment.

Present: Judge D. F. Pugh, for plaintiff. Mr. Seymour, for defendant.

And also FRANK TALLMADGE, a witness produced on behalf of plaintiff, who being first duly sworn, testified as follows:

Examined by Judge PUGH:

Q. Give your name and residence, Mr. Tallmadge?

A. Frank Tallmadge, 1517 East Long street, Columbus.

Q. How long have you lived in Columbus?

A. Two years.

Q. Where did you live before the two years?

A. In Marion township, on East Broad street, just east of Alum creek.

Q. How far from Alum creek?

A. Half a mile.

Q. How near to the part of Broad street, or the Columbus and Granville road, that was improved by grading and asphalting?

A. Why, I lived right on that part—right on that road.

Q. On that improvement?

A. Yes, sir; that part of it.

Q. How long did you live there at that place?

A. Ten years.

Q. Whose property was that on which you lived?

A. When I moved there it belonged to Messrs. Callender and Wall and Heffner.

Q. It is known as the Willis property?

A. While I was there it was sold to what is known as the Bullitt syndicate.

Q. It had been the Willis property, though?

A. Yes, sir.

91 Q. Are you acquainted with the tract of land on that road which, at the beginning of this suit, belonged to Dr. Shepard, Mr. McLeish and Mr. Carr?

A. Every foot of it.

Q. What is your occupation—what has been your occupation, Mr. Tallmadge?

A. When I moved to the place described by me in former answers I was in the grain business. I shortly after moving there gave that

up, and became a farmer. A few years after I became a casualty adjuster of Columbus.

Q. When did you leave the Willis, Callender and Wall property?

A. The first of March, 1898.

Q. Prior to your leaving there did you know of property being sold in that neighborhood?

A. Yes.

Q. From 1889 up to the time you left?

A. All property that changed hands in that immediate neighborhood came within my knowledge.

Q. Did you know of property in that neighborhood and along this same road that was improved, being sold before the improvement was made—before the road was made—in '89 I mean?

A. Yes, the Denmead tract and the Willis tract upon which I resided sold that year.

Q. And wasn't it also true of the old woman's property down at the other end, I can recall her name—Draut—the Draut property?

A. I have forgotten that piece of property.

Q. Well, do you know of any property out there being sold after the road was improved?

A. Yes, the corner of—the first street east of the improvement to Broad street, was sold to Mr. Tracy.

Q. One was sold to Tracy, and wasn't there another sold to some one else?

A. Not on the Broad street; he bought the full Broad Street frontage.

Q. Before the improvement, what was the grade of the road in front of Dr. Shepard, McLeish and Carr's property, with reference to the grade of your property? Before the improvement.

A. Previous to the improvement there was a high and dry pike that was ditched on both sides, and this pike was cut down some; the grade was lower.

Q. Do you mean by the improvement?

A. Yes.

Q. Was that true as to all of it, or only part of it, in front of their property?

92 A. The sewer traps were placed right in front of the property you speak of, making a grade down from the bridge and from the hill.

Q. That is about the middle of the property, is it, about the middle of the front of their property?

A. Yes.

A. It is lower there now, the road is, than it was before the improvement?

A. Yes, sir; yes, sir.

Q. How is it as to the two ends opposite their property?

A. Well, from the fact that it is lower in the center, would make the two ends higher.

Q. Now, then, Mr. Tallmadge, before that road was made, what, in your judgment, was the value of that property of Shepard, Mc-

Leish and Carr—I mean the front foot—1119 feet long and 250 feet deep?

A. Worth $500 an acre.

Q. How much, in your judgment, was that same parcel of land a front—1119 feet long and 250 feet deep—worth immediately after the road was finished—after the improved road was finished?

A. Well, that property, like all other property at the time you refer to, depreciated in value.

Q. I am speaking now—I am referring to the time immediately after the improvement was finished there—say in November or December, '91, assuming that the improvement began in September, 1890, and was finished about the first of October, 1891? I want to know what it was worth immediately after the road was finished—after the improvement was finished? I want the cash value.

A. Well, I don't think there was much change in that land—the value—not between those two dates, except that that required the purchase of a large amount of earth in order to fill in for that particular part of the tract to appreciate.

Q. If that was done by Dr. Shepard and his associates, I don't want you to consider that in your estimate of the value of it. Leave that out.

A. There was practically no change in the value of the land until after the last date you mentioned; after that date the land depreciated in value, out there, very materially.

Q. What, in your judgment, was the value of the special benefits derived by the property of Dr. Shepard, McLeish and Carr from that improvement, over and above the general benefits derived from it by the whole community?

93 Question objected to by counsel for defendant.

A. Well, there was none.

Cross-examination.

Examined by Mr. SEYMOUR:

Q. Mr. Tallmadge, do you say that the building of an improved road in front of that property 1119 feet long, costing $11.25 per foot, and that improvement being nearly paid for, would not make the strip abutting on said improvement, 250 feet deep, any more valuable?

A. No, because the land was potato land, and it could not stand the expense of such a street as would ordinarily be placed in front of property worth $300 a foot front.

Q. I say would that add anything to its value?

A. It didn't add anything to this land's value. I don't believe that that asphalt being planted there fertilized that any for potatoes, and that is the only way to improve that land.

Q. Do you consider potato land, as you call it, worth $500 an acre?

A. The strip in front 250 feet deep was worth that much.

Q. Why?

A. Well, at that particular time there was a general awakening towards property out there.

Q. Could you raise more potatoes on land abutting on the improvement than you could back of the improvement?

A. No.

Q. Mr. Tallmadge, as a matter of fact, isn't the proximity of the land to the city of Columbus, its nearness to the principal thoroughfares there, and lots of things, that make that land valuable?

A. I don't consider land east of Alum creek valuable except for gardening purposes; Alum creek stands there as a barrier, and there are no—there have been no improvements out there—substantially, no. And I don't think that that land lying as close as you say it is to the corporation of Columbus, can be considered so valuable after you have seen it as you describe it on paper.

Q. What was that land worth a foot front after the improvement was made?

A. I don't know anything about foot front of farm lands.

Q. Were any sales made just east of this land abutting on the same improvement by the foot front?

A. You mean Mr. Tracy's purchase?

94 Q. I am asking if there were sales made by the foot front?

A. Yes, Mr. Tracy was the purchaser.

Q. What price was paid at that sale?

A. I have understood that Mr. Tracy was allowed the privilege of paying $75 a foot front.

Q. Now, Mr. Tallmadge, your statement is, that if that improvement was made, as it was made in 1890–91, and paid for, that the land abutting on either side of it was not worth one penny more after the improvement than it was before?

A. Mr. Seymour, that is just exactly what I maintain.

Mr. SEYMOUR: Well, that is all I want to know.

Redirect examination.

Examined by Mr. PUGH:

Q. Did you hear of any sale, Mr. Tallmadge, after the improvement was made, of lots or fraction of lots—fractions less than an acre, a little bit south of the improved road?

A. I believe we figured those lots ⅝ of an acre.

Counsel for defendant asks that that be stricken out.

Question read.

A. Yes, sir, they were south of them, south. Yes, there were several of them sold.

Q. Do you know how much they sold for?

A. $1500.

Q. How were they situated with reference to the grade of the streets in front of them?

Question objected to by defendant's counsel.

A. Those lots were higher than the grade of the street.
Q. How much higher?

Question objected to by counsel for defendant.

A. Five or six feet.
Q. How was the Tracy lot situated with reference to the grade of the street after the improvement was made?
A. The Tracy lot was very much higher.
Q. Well, I will ask you this; it is a little bit leading; it is adapted for the purpose of building, the Tracy lot?
A. Yes, a very fine building lot, the Tracy lot.
Q. Would there have to be any change made in the grade of the lot to enable a person to build on it?

Question objected to by counsel for defendant.

A. Oh, no.

95 At this point the further taking of depositions was adjourned to Wednesday, June 6th.

WEDNESDAY MORNING—Ten o'clock.

Dr. SHEPARD resumed the stand.

Redirect examination.

Examined by Judge PUGH:

Q. Doctor, have you inspected the paper entitled Exhibit D shown to you by counsel for the defendant?
A. Yes, sir, I have inspected it.
Q. Did you sign it?
A. I did not sign it.
Q. Was the Columbus and Granville road, on which your property abuts improved, before it was improved under the act of the legislature by grading and asphalting?

Question objected to by counsel for defendant.

A. It was improved before that time by the county commissioners; they made a gravel turnpike.
Q. After the improvement by grading and asphalting was finished, did you use the bank made by the roadway for the purpose of holding the water in your ice pond?
A. The original road furnished an embankment for the premises, and the water in our pond came up to the smallest possible extent for about 100 feet on the old embankment, and between the original embankment and our lake was a strip of higher ground. The water from the lake came around this little curve, leaving it like an

island; between the island and the lake; the water from the lake got up to this island to the embankment in a very shallow manner.

Q. You are speaking of the original road?

A. Yes.

Q. I am talking about the road made by the improvement?

A. It didn't come up to the road made by the improvement. I didn't understand the question; it came up to the old road, but not to the new road at all.

Q. When you signed the paper entitled "Exhibit B," and shown to you by counsel for the defendant, did you understand that you had no authority as a member of the board of improvement to sign such a paper?

A. I didn't suppose I had any authority as commissioner. I signed as an individual simply.

96 Q. You signed it as a member of the board?

A. I signed as a member of the board, but I had no authority to do so.

Q. Besides signing this paper and appointing a superintendent, what else, if anything, did you do as a board?

A. Did nothing; I don't think we ever met as a board, excepting to name a superintendent.

Q. Did the board of improvement, or any member of it, exercise any control over the manner of making the improvement?

A. Not to my knowledge.

Q. Did the board, or any member of it, give any direction to the contractor or the superintendent, as to how the improvement should be made?

A. Not to my knowledge.

Q. Did you individually exercise any control over the contractor, or the manner of constructing the improvement, or give any instructions to him or the superintendent?

A. No, none whatever.

Q. I will ask you whether you knew at the time this improvement was made, or at the time the assessment was made, that the law under which the assessment was made was unconstitutional?

A. I had no idea that it was.

Q. I will ask you when you first learned that the law was unconstitutional; about when?

A. Within the last six months, I should think six months, or a year.

Q. I will ask you whether you were ever notified, or summoned or notified, either verbally or in writing, to attend an inspection, an examination, of the line of this improvement by the county commissioners, or a hearing of the county commissioners of the question, whether the foot frontage of the land abutting on it, with the improvement, would be well worth double the estimated expense of that improvement?

Question objected to by counsel for defendant.

A. I never was notified of any such conference, and never attended any such conference.

Q. I will ask you when you first learned that the county commissioners had made such an examination and inspection and had determined the question as to whether the foot frontage of the land with the improvement, would be worth double the estimated expense of the improvement?

A. I never knew that they made any such examination.

97 Q. Well, you know it now?

A. I know it now.

Q. When did you first learn that?

A. I first learned it when a certain answer was made by the—when answer was made in this case was the first I knew of it.

Re-cross examination.

Examined by Mr. SEYMOUR:

Q. Doctor why didn't the water come up to this new bank made by the improvement?

A. The old bank was 10 or 12 feet high, and the new bank was 3 or 4 feet on top of that. It only came up 6 or 8 inches in the old bank.

Q. The embankment made by the road on which this improvement was made, formed the bank of your pond still, didn't it?

A. The old bank, the old road bank, formed a bank to our pond. The new bank formed no bank whatever to our pond.

Q. That is, the water didn't come up as high as the new one?

A. No, not by 8 or 10 feet.

Q. You were regularly appointed a commissioner of your improved road by the board of county commissioners, were you not?

A. Yes.

Q. For all purposes that such a commissioner should act?

A. As far as I knew I was appointed a commissioner to attend to the duties.

Q. By the board of county commissioners?

A. Yes, sir.

Q. Doctor, why did you ask that this road should be improved in front of your property at that time?

A. The expectation was that it would increase the value of the property there.

Q. That it would benefit your property?

A. Yes.

Q. That is what you expected, and that is the reason you were active in having that improvement made?

A. Yes.

Judge PUGH:

Q. I will ask you now whether, in your judgment, the property had derived any special benefit from the improvement over and above the benefits shared in by you with the whole community.

Question objected to by counsel for defendant.

98 A. Not any more than the community at large received benefits.

Q. Do you know the exact amount of assessments you paid, Doctor?

A. We paid seven assessments. I don't remember the exact figures.

Q. You may refresh your memory, Doctor, from these papers. (Handing witness papers.)

A. Upon refreshing my memory I would say we paid $11,981.22.

At this point the further taking of depositions was adjourned.

Dr. WILLIAM SHEPARD (recalled).

Examined by Judge PUGH:

Q. Doctor, you were asked on cross-examination about being a member of the legislature. When were you a member of the legislature?

A. Elected in 1885 for two years.

Q. And you served one term—once elected and served one term?

A. Yes, two years.

THURSDAY, *June 14th*, 1900.

And also WALTER BRAUN, a witness produced in behalf of plaintiff, who, being first duly sworn, testified as follows:

Examined by Judge PUGH:

Q. Give your name?

A. Walter Braun.

Q. Occupation?

A. Civil engineer.

Q. Do you fill any official position?

A. Deputy county surveyor.

Q. How long have you been such?

A. Been deputy about ten or eleven years.

Q. Were you a deputy under John J. Dun, in 1890, and the following years?

A. Yes, sir.

99 Q. I will ask you whether you had any connection with the East Broad Street suburban improvement as deputy county surveyor?

A. Yes, I was put in charge of the work after the first engineer, Mr. Legg, retired from office.

Q. That is the improvement, is it, for paying the costs of which the property of Shepard, McLeish and Carr was assessed?

A. Yes, sir.

Q. Who made out the assessment sheet?

A. I made out the assessment sheet.

Q. What is the assessment sheet?

A. It is the sheet showing the cost of the improvement per foot front on the abutting property.

Q. I will ask you how you made the assessment for the East Broad Street improvement?

A. The total cost of the street was taken as shown from our record—taken from the contract book, and was taken from the auditor's records as given by the auditor, the total cost was then proportioned on the abutting property by the lineal foot.

Q. Each foot then was assessed the same as every other foot front?

A. Yes, sir.

Q. When were the sewers constructed, Mr. Braun, with reference to the time when the assessment sheet was made?

A. The sewers were constructed after the original assessment was made out; they did not enter into the original contract nor the original assessment.

Q. You mean by that that the cost of the sewer was not included in the assessment of $11.25 a foot front on the property?

A. Yes, sir.

Q. Who has the custody of the assessment sheet?

A. The auditor has custody of the assessment sheet.

Q. And that sheet shows the rate per foot front, does it?

A. Yes, there is a rate assessment sheet which shows the rate per foot front, and later on there was an itemized cost of the street made out.

Q. Who made that out?

A. I made that out.

Q. You say you made that after the assessment sheet was made?

A. Yes, to show the various items.

Q. Do you recollect the exact time when the improvement was finished, Mr. Braun?

A. I couldn't tell just the date when it was finished.

100 Q. Have you with you a book containing the cost of the improvement that was paid to the contractor?

A. Yes, sir.

Q. You may state the amount was paid to the contractor?

A. The amount paid to the contractor was $89,470.09.

Q. Who was the contractor for building the sewers?

A. E. M. Stanley built one of the sewers?

Q. The contractor whose cost amounted to $89,470.09 was N. B. Abbott, wasn't it?

A. Yes, sir.

Q. In what year were the sewers built?

A. I don't recollect the year; the contract would show that. I would have to look that up in the contract.

Q. It wasn't done in the year '91, was it?

A. It wasn't done in '91.

Q. Was it done after the year '91?

A. Yes, it was done after the year '91.

Q. What buildings were on the property of the complainants, Shepard, McLeish and Carr?

A. There were no buildings, no dwellings, but there were several ice houses. They were back 5 or 6 hundred feet.

Q. There were no buildings at all any time on the strip 250 feet deep?

A. No, sir.

"EXHIBIT E."

Agreement.

Agreement by and between Leonard Carr, party of the first part, and William Shepard, Charles McLeish, Thomas C. McLeish and Joseph Busch, party of the second part.

Witnesseth: The said Leonard Carr agrees to sell to the said Thomas J. McLeish and Joseph Busch all of his interest, being the undivided one-third part thereof, in the property owned by the Alum Creek Ice Company in which heretofore the said William Shepard, Charles McLeish and Leonard Carr were equal partners, each owning one-third interest in the property, real and personal, belonging to the said Alum Creek Ice Company.

The said Leonard Carr further agrees to deed to said Thomas J. McLeish and Joseph Busch the one undivided third part of the real property heretofore belonging to said Alum Creek Ice Com-
101 pany, consisting of about thirty-nine acres of land on Broad street and Alum creek immediately south and east of the Alum Creek bridge on Broad street, and adjacent to the city of Columbus, Ohio, and also the undivided one-third part of ten acres of land owned by said company near the Licking reservoir in Fairfield county, Ohio.

The said Leonard Carr also agrees to sell and does hereby sell and convey to said Thomas J. McLeish and Joseph Busch his undivided one-third interest in the personal property heretofore belonging to said Alum Creek Ice Company. Said personal property consisting of a lease made by the State of Ohio; the ice houses, buildings, horses, wagons, ice tools, outstanding claims and bank accounts and being all the personal property owned by said partnership heretofore known as the Alum Creek Ice Company consisting of the parties heretofore named as said partners. The deed for the real estate, and the personal property heretofore described, to be delivered to said Thomas J. McLeish and Joseph Busch, conveying the interest therein of said Leonard Carr, on the performance by said parties of the second part of the conditions to be performed by them as hereinafter set forth.

The said Thomas J. McLeish and Joseph Busch agree to pay said Leonard Carr for said property heretofore described the sum of $10,250.00, as follows: $1,250.00 of said sum to be paid this day. $1,000 in thirty days from the date hereof, $1,000.00 in sixty days from the date hereof, and $1,000.00 in ninety days from the date

hereof. Said three thousand dollars which is to be paid in thirty, sixty and ninety days, as aforesaid, shall be evidenced by three promissory notes executed and delivered to said Leonard Carr, signed by William Shepard, Charles McLeish and Joseph Busch. The balance of said purchase price, to wit: the sum of $3,000.00, to be paid in one, two and three years from the date hereof in equal payments of $1,000.00 each, and to be evidenced by three promissory notes signed by said Thomas J. McLeish and Joseph Busch and secured by mortgage on the real estate this day sold to them and described as the thirty-nine acre tract on Broad street. All said notes for said deferred payments to bear interest at six per cent. per annum, payable annually from date hereof.

In addition to said purchase money paid and to be paid as heretofore set forth, the said William Shepard, Charles McLeish, Thomas J. McLeish and Joseph Busch agree to assume and pay all the outstanding indebtedness of the late partnership known as the
102 Alum Creek Ice Company. Said indebtedness to include all notes, mortgages and all obligations owing by said firm whether the same be evidenced by notes or other obligations signed by said company or firm name or signed by the said William Shepard, Leonard Carr and Charles McLeish in their separate individual names. The intention hereof being to require said parties of the second part to assume all indebtedness contracted by or for said partnership heretofore known as the Alum Creek Ice Company. Said indebtedness to be paid as the same matures. Said parties of the second part further agree that they will take up the outstanding notes, except those secured by mortgage, now held by the creditors of said Alum Creek Ice Company and substitute therefo. other notes signed by the new members of said firm in connection with said William Shepard and Charles McLeish as soon as they may be able to do so.

The said conveyance from said Leonard Carr to Thomas J. McLeish and Joseph Busch shall be made subject to the mortgage on said property, and to all taxes, liens and assessments now due or hereafter to become due.

The note held by Mamie Carr, originally given for $1,500.00, upon which some payments have been made, being for indebtedness by said firm, shall be paid by the members of the new firm; and no part thereof shall be paid by said Leonard Carr.

In witness whereof, the parties hereto have hereunto set their hands this 1st day of July, 1899.

LEONARD CARR.
CHAS. McLEISH.
THOMAS J. McLEISH.
JOSEPH BUSCH.
W. SHEPARD."

It is stipulated and agreed by the parties through their attorneys that the aggregate of the frontage along the improvement in question, including both sides of the road or street, was 9615 and 38-100

feet; that the improvement of Broad street or road was completed on the 1st day of October, 1891; that the paper marked "Exhibit A" was filed with the county commissioners on the 28th day of September, 1891; that the county commissioners ordered the improvement to be made on the road May 3rd, 1890; that on the 18th day of August, 1890, said commissioners established in said
103 Broad street a public circle 250 feet in diameter; that on the same day the said commissioners awarded the contract for constructing the improvement to N. B. Abbott; that the frontage of the Stansberry lot was 555 feet, and that the cost of the sewers *were* $6115.

Exhibits "A," "B," "C," "D" and "E" are offered in evidence and made a part of these depositions.

It is further stipulated and agreed by the parties that the services of the superintendent appointed by the board of improvement amounted to the sum of $186.00, and that the following letter contains a correct statement of the cost of the circle and a portion of the costs that was assessed upon the property owners:

"COLUMBUS, OHIO, *Sept. 4th*, 1891.

Auditor, Franklin county.

DEAR SIR: In answer to your inquiry about the cost of the East Broad Street circle, Deputy W. Reamy has made the following rough estimate:

Cost of circle	$17,862
Cost of straight road	7,272
Extra cost of circle	$10,590
The Bullitt Park Co. would have paid on about 800 ft. on a straight road, but on circle will pay on about 1056 feet frontage, or 256 feet more at about $10.00 per foot, or...	2,560
Balance extra cost of circle	$8.030

Yours truly, JOHN A. DUNN,
County Surveyor."

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

WILLIAM SHEPARD, CHARLES MCLEISH, and LEONARD CARR, Complainants,
vs.
O. E. D. BARRON, Treasurer, Franklin County, Ohio, Defendant.

By agreement of parties, by their counsel, the depositions
104 of the within named witnesses were taken before Mr. George L. Stoughton, a notary public, and at the time and place agreed upon.

Testimony Offered on Behalf of Defendant.

FRIDAY, *June 15th*, 1900—4 o'clock p. m.

Present: Judge D. F. Pugh on behalf of complainants. Mr. J. H. Dyer on behalf of defendant.

Mr. DYER: It is stipulated and agreed that the following is a copy of the record of the county commissioners of Franklin county, Ohio, under date of March 31st, 1890:

"MONDAY, *March 31st*, 1890.

"This day the petition of Logan M. Bullitt and others for the improvement of East Broad street from the east side of Alum creek to the road known as the Cas[illegible] road, was presented to the board of commissioners. Thereupon the board appointed Tuesday, the 29th day of April, 1890, at 10 o'clock a. m., at the office of the county commissioners in the court house of Franklin county, Ohio, as the time and place for the hearing of said application, and also ordered that notice of said hearing be published in the Weekly Post, a newspaper of general circulation in the vicinity of the proposed improvement to be made for not less than two consecutive weeks, once each week, and ordered also that service of like notice be given to all owners of property fronting upon the proposed improvement, their agents and attorneys, at least two weeks before said hearing."

It is also stipulated and agreed that the following is a copy of the commissioners' record of Franklin county, Ohio:

"COLUMBUS, OHIO, *March 5th*, 1890.

To the hon. board of county commissioners:

This is to certify that I have served the above notices of the proposed improvement of East Broad St. on the following property owners:

Alum Creek Ice Co., Albert McAlla, Logan M. Bullitt, per John Mitchell, ag't, Josiah Lun, Fred and Eliza Benninnus, Frederick Miller, Henry Stansberry, per Henry E. Taylor, ag't, Francis C. Sessions, Mary A. O. Markeson and Larkin Lowe.

JOHN J. DUN,
County Surveyor,
Per E. E. LEGG, *Deputy*."

105 It is also stipulated and agreed that the following is a copy of the commissioners' record of Franklin county, Ohio:

"TUESDAY, *April 29th*, 1890.

"In the matter of the petition of Logan M. Bullitt and others for the improvement of East Broad street, Marion township, said matter

having been set for hearing this day, and the following claims for damages having been filed, viz., to wit:

William F. Miller, $2500 damages, $250 compensation.
E. Bennigus, 1800 "
Sarah R. Barr, 1000 "

and the board desiring to visit said improvements first, hereby postponed said matter until Friday, May 2nd, 1890, at ten o'clock, as the date of her claims for damages, etc.

Yeas, CASSADY AND MOREHEAD."

It is also stipulated and agreed that the following is a copy of the commissioners' record of Franklin county, Ohio:

"SATURDAY, *May 3rd*, 1890.

"In the matter of East Broad Street improvement, the commissioners of Franklin county, Ohio, since the filing of the petition for the improvement of East Broad street from the east end of the bridge across Alum creek to the Cassady road, have made a personal inspection and examination of the land of the proposed improvement, upon each side of the said proposed improvement, and are satisfied after such examination and inspection that the said improvement will be for the public welfare and convenience.

The commissioners further find that to construct the said improvement it will be necessary to assess the lands upon each side of the said proposed improvement about the sum of $7.25 per foot front, and they further find that the present valuation per foot front of lands fronting and abutting upon said proposed improvement is upon an average of $20.00, and that after the said proposed improvement has been made as prayed for in said petition the average valuation of lands abutting thereon per foot front will be worth at least the sum of $40.00, which will be more than double the estimated expense of the said proposed improvement.

106 The further consideration of the claims for damages and compensation was again postponed until Monday, May 5th, 1890, at 10 o'clock a. m.

MOOREHEAD & CASSADY,
County Commissioners."

It is also stipulated and agreed that the following is a copy of the commissioners' record of Franklin county, Ohio:

"MONDAY, *May 19th*, 1890.

In the matter of the extension and improvement of East Broad street, the hearing of the petition for the extension and improvement of East Broad street having been adjourned from the 29th day of April, A. D. 1890, until this 19th day of May, A. D. 1890, at 2 o'clock p. m., and now all parties being present in person, or by agent or attorney, the petition in this case came on to be further heard, and

after examining the papers filed in this case, and hearing the testimony, the commissioners find that the petition for the extension and improvement of East Broad street has been duly signed by the property owners representing a large majority of the feet frontage of the lands abutting upon said street between the said limits mentioned in the said petition as the starting point for said improvement, at the east end of the bridge across Alum creek, and extending eastward therefrom to the Cassady road. The said points being the points named in the said petition where the said improvement shall begin and end, and the distance between said points mentioned being about 5000 feet. And the commissioners find that the owners of a clear majority of the feet front of lands abutting the said proposed improved roadway favor said improvement, and that the proposed improvements are judicious, and hereby declare said improvement authorized and established and do declare the width of said road legalized and established as to the dimensions and manner as prayed for in said petition, to-wit:

To be of the width of 100 feet throughout the entire distance between said points above named as the starting and ending points of said improvements, and the county surveyor of said county of Franklin is hereby required and ordered, upon receiving notice of the action taken by the commissioners herein, that said road has been widened and other improvements authorized as prayed for in said petition, to proceed at once to survey said road,
107 erect stakes or monuments in front of each piece of property making the outside lines of such road so widened as above ordered, and doing whatever other work necessary for the carrying out and extension of said work as ordered. And now the claim filed herein by William Fred Miller, coming on for hearing was heard upon the testimony presented for and against said claim for damages and by the consent of all parties in this case, and with the consent of W. Fred Miller, the commissioners do find and determine the amount fairly due the said W. Fred Miller as damages for land, building and fences appropriated for the widening of the said street to be the sum of $1250.00.

And thereupon next came on for hearing the claim for damages filed herein by E. Bennigus, and said claim was heard upon evidence offered in favor of and against said claim, and by consent of said claimant and the other parties interested in the said improvement and property holders, the commissioners do find and determine the amount fairly due for the said claimant for land and improvements appropriated for the widening of said street to be $600.00.

There being no other claim for damages presented or filed by any owner of property along or adjacent to said proposed improvement, it is ordered by the commissioners herewith that the work for furnishing materials and constructing the said proposed improvement in accordance with the prayers of the petition herein be let to the lowest and best bidder after two weeks' notice of said letting shall be published in the Columbus Evening Post, a newspaper of general circulation in the vicinity of said proposed improvement. Said

letting of said work and furnishing of materials, and constructing said improvement to be opened at the office of the county auditor on Wednesday, January 4th, A. D. 1890, at 12 o'clock noon, and it is ordered that all bids received shall be in accordance with the rules established for letting of said contract, which are printed and posted in the office of the said commissioners.

The board this day appoint J. C. Lunn, J. C. Mitchell, Albert McCalla, William Shepard and John J. Dun (surveyor) as commissioners of East Broad Street improvement (in Marion township.)

Resolved by the county commissioners of Franklin county, Ohio, That the bonds to be issued for the extension of East Broad street, from the east end of the bridge across Alum creek in Marion township, of Franklin county, Ohio, and for the improvement of said street, from said east end of said bridge to the Cassady road
108 under the authority of law passed by the General Assembly of the State of Ohio, March 26th, A. D. 1890, entitled, "A bill to authorize county commissioners in counties in which there are situated cities of the first grade of the second class, to improve roads extending from such cities or intersecting streets in certain cases; shall be of the denomination of $1,000 each, bearing interest at the rate of 6 per cent. per annum, payable semi-annually, interest and principal payable at the office of the treasurer of Franklin county, in the city of Columbus, Ohio, and one-tenth part of the principal of said bonds shall be payable on or before the first day of July in each and every year until said bonds shall all be paid, said payment of said principal of said bonds to commence July 1st, 1891. Said bonds shall be dated July 1st, 1890.

Resolved by the county commissioners of Franklin county, Ohio, That the county auditor be, and he is hereby, ordered to prepare and advertise for sale the sum of $40,000 of the bonds of said county, to be designated East Broad Street improvement bonds. Bids for said bonds to be received until noon Monday, June 2nd, A. D. 1890.

MOOREHEAD & CASSADY."

It is also stipulated and agreed that the following is a copy of the county commissioners' record of Franklin county, Ohio:

"COLUMBUS, OHIO, *June 29th*, 1891.

"To the commissioners of Franklin county, Ohio.

DEAR SIRS: The undersigned hereby agree in order to settle all controversy about the continuation of the improvement on East Broad street to Alum creek to Cassady road that if said work is pushed through to completion without delay, that they will secure and pay the entire expense in removing all the earth upon the circle in East Broad street, and beautifying and adorning said circle. This proposition is made, however, only upon condition that the

street around said circle be completed and paved in accordance with the plat, order and contract hereinbefore made.

EUGENE POWELL,
Ag't of Columbus Land Association."

"The undersigned owners of real estate abutting upon the extension of East Broad street, now being improved under the
109 proceedings by and before this board of county commissioners of Franklin county, hereby withdraw all objections to said improvement, and the assessment of their said real estate therefor, on condition that the foregoing agreement shall be kept by said Columbus Land Association.

(Signed) ALUM CREEK ICE CO.
F. C. SESSIONS.
REV. JAMES KEYS, *Ag't.*
MARY P. MARKESON,
Per C. E. MARKESON.
A. E. McCALLA.
WILLIAM F. MILLER.
LAKIN LOWE.
J. C. LUNN."

Counsel for complainants object to the introduction in evidence of the foregoing because the original is not proved to have been lost or destroyed, and because the original is the best evidence.

It is also stipulated and agreed that the following is a copy of the records of the county commissioners of Franklin county, Ohio:

"MONDAY, *August 18th*, 1890.

Resolved by the commissioners Franklin county, Ohio, That there be and hereby is established in Broad street a public circle 250 feet in diameter, which land is donated by the Columbus Land Association. Said circle to be, however, dedicated to the public use and located as shown by the proof on file at the office of the county surveyor of said county."

It is further stipulated and agreed that on the 1st day of July, 1899, a warranty deed was executed by Leonard Carr, one of the complainants herein, as grantor, to James McLeish and Joseph Busch, conveying the premises described in the complaint herein, in which deed the following stipulation appears:

"Except a mortgage for $6,000.00 given by William Shepard, Charles McLeish and wife, and Leonard Carr and wife to F. F. Hoffman as recorded in Mortgage Record 156, page 560, Franklin county, Ohio, records, and excepting all taxes and assessments, of whatever kind and nature, that may be a lien on the one-third part of the Marion Township property hereby conveyed, and all taxes, liens and assessments that may be due and unpaid on the other property hereby conveyed being hereby assumed by the grantees herein as part of the purchase price for said premises."

It is further stipulated and agreed that the following is a copy of the county commissioners' record of Franklin county, Ohio:

110 "To the honorable board of county commissioners of Franklin county, Ohio:

Whereas, on the 31st day of March, 1890, a petition signed by the subscribers hereto, was by us presented to the board of county commissioners of Franklin county, Ohio, praying for the extension of East Broad street in this county, beginning at the bridge across Alum creek on said street, and advancing eastwardly therefrom to Cassady road, which said portion of said street lies in Marion township, said county, which said improvement was in said petition prayed to be made under the provisions of an act of the General Assembly of Ohio, entitled "An act to authorize county commissioners in counties in which there are situated cities of the first grade of the second class to improve roads extending from such cities and other roads or streets in certain cases," passed March 26th, 1890, which said petition stated with what material said street should be paved and what provisions should be made for sidewalks, gutters and other passages for carrying off water, and between what points said street was to be improved, and the kind of material of a permanent character said commissioners desired used in said improvement, and

Whereas, said petition was signed by all persons owning property abutting upon the portion of said street in said petition asked to be improved, said petition stating the number of feet between the termini of said improvement, and

Whereas, such proceedings were had by said board of county commissioners on said petition, and in accordance with said act of the General Assembly, that the prayer of said petitioners was granted and said improvement was ordered to be made in accordance with the prayer of said petition, and

Whereas, said original petition as well as other papers filed since said original papers, and certain orders made by said board of county commissioners, relating to said improvement, have been lost or mislaid, and

Whereas, since the making of said original order by said board of county commissioners directing said improvement to be made some important changes in the plan, extent and character of said improvement have been ordered by said board of county commissioners, and have been made or are now being — at the written request of each and all of —, including the construction of a circular park in said street and sewers for proper drainage and other things not herein particularly mentioned, and

111 Whereas, by reason of said changes and extensions the cost of said improvement has been increased in a large amount beyond that contemplated, and which would have been sufficient according to said original petition and plan, and

Whereas, some doubts have arisen as to the legality of the proceedings of said board of county commissioners in said matters and

of bonds that have been or may hereafter be issued by said board of county commissioners for the purpose of raising the means to pay the cost and expense of said improvement.

Now, therefore, in consideration of said improvement as the same has been and now is being constructed, and in order that the bonds heretofore issued and to be issued to pay for said improvement may not lie under suspicion or remain unsold by reason of the absence, or loss of said original or other papers and orders, or by reason of the other matters, acts and things hereinbefore stated, we, and each of us, hereby agree that such petition hereinbefore recited was filed, signed by us as herein stated, and that we will not set up as a defense against the collection of any assessment upon our said property abutting upon said improvement for the payment of bonds issued, or to be issued on account thereof, any informality or irregularity arising from the absence or loss of any of said papers, or any of the other matters and things hereinbefore recited, but agree that said improvement has been and now is being legally made and constructed, and we hereby request that you execute and issued such further amounts of bonds as shall be necessary to pay the costs of said improvement.

(Signed) LOGAN M. BULLITT,
Per THE COLUMBUS LAND ASSOCIATION,
By T. E. POWELL,
Director. Feet Front, 3775.34 *Ft.*
MARY P. MARKESON,
By C. E. MARKESON,
Ag't in Fact. Foot Front, 375.54.
F. C. SESSIONS. *Feet Front*, 747.41.
WILLIAM SHEPARD. *Feet Front*, } 1111.
CHARLES McLEISH, }
J. C. LUNN. 361.87.
THE HEIRS OF HENRY STANSBERRY, DECEASED,
By JOHN R. STANSBERRY,
Ag't in Fact. 550 *Feet.*

And whereas, the further sum of $60,000 is now required to pay the cost and expenses of said road improvement so far as the same has progressed.

Therefore, resolved that there be at once executed and delivered to the Ohio savings bank $60,000 of the bonds of this county
112 on payment therefor *of* said bank of the amount bid for same on August 1st, 1891, to 60 bonds of $1,000 each, to bear date of July 1st, 1891, to be numbered from No. 51 to 110, both inclusive; to bear interest at 6 per cent. per annum payable semi-annually on the 1st day of January and July in each year, principal and interest to be payable at the office of the treasurer of Franklin county, Ohio."

CASSADY, MOOREHEAD AND McDONALD."

Counsel for complainant object to *the* so much of the foregoing copy from the record of the county commissioners as purports to give a copy of the paper addressed to the county commissioners and signed by Logan M. Bullitt, William Shepard, Charles McLeish *et al.*, because there had been no proof of the destruction or loss of the original paper, and because there is no proof that said Shepard and McLeish signed said paper, either the original paper or a copy of the original, or the paper spread on the records of the county commissioners; and because if the said paper is a copy of another paper of similar import, about which Shepard was cross-examined, and which is marked "Exhibit A" in his deposition on cross-examination, the original is already in evidence.

SATURDAY MORNING, *June 16th*, 1900.

And thereupon CHARLES O. TRACY, a witness produced on behalf of defendant, who being first duly sworn, testified as follows:

Examined by Mr. DYER:

Q. You may state your name?
A. Charles O. Tracy.
Q. Where do you live?
A. 593 E. Broad street.
Q. You may state, Mr. Tracy, whether or not you are the owner of any property on what is known as the East Broad Street improvement?
A. Well, I am not the present owner at this time; my wife is. I bought the property originally.
Q. When did you purchase that property?
A. I should say in August, '91, as near as I could get at it.
Q. State what was the condition of the East Broad Street improvement there at that time?
A. I have nothing to go by, but my recollection is that the
113 asphalt was done. The cross road that runs north of that property—that is the first square this side of that circle, that wasn't done as yet, for that is just a graded street.
Q. Was the Broad Street improvement practically completed out below the bridge?
A. My recollection is that it was.
Q. I will ask you to state what you gave for the property per front foot?

Question objected to by counsel for plaintiff.

A. $75.00 for the Broad Street lot, and $15 a front foot, I believe, for the lot just back and adjoining the Broad Street lot.
Q. I will ask you to state whether or not you considered that a fair market value of the property at the time you yourself purchased?
A. Well, there is a great deal in prospective, taken at that time. I thought like many others, supposed the property being improved

would increase more rapidly. I thought that a fair price at that time.

Q. Did you know of any property, any other property, in the vicinity of yours, that was sold at or about that time?

A. I don't know of any on Broad street; a majority of the sales were lots sold on cross streets, the $15 price.

Q. What frontage have you on Broad street?

A. The lot, I believe, was 100 feet front on Broad street.

Q. And how deep?

A. 250 feet.

Cross-examination.

Examined by Judge PUGH:

Q. Wasn't some of the value of that property fictitious?

A. Well, undoubtedly, when they put that street there it added very materially to the cost of—to the original cost of the property. I didn't buy the property on that basis—as a matter of speculation. I bought it thinking I might want to use it for a suburban home, bought it really for personal use, and that is the reason I bought the lot back of it so that I could have plenty of room.

Q. Do you know where the property belonging to Dr. Shepard, Mr. McLeish and Carr is situated?

A. Dr. Shepard's property is the ice plant, I believe; the ice house. I don't know anything of the Carr property.

114 Q. Do you know anything about the value of that property when the improvement was finished?

A. No, sir; I don't know anything of the value of the property there at all.

Q. Do you think that was worth as much as yours?

A. I would not have paid the same price for it, it was lower and there was too deep a grade made there.

Q. You don't know of any property ever selling there—of any property being sold there, except East Broad street?

A. I don't know of any on Broad street.

Q. What was the grade of your lot above the street?

A. Probably 4 to 5 feet.

Q. And in the condition for residence purposes?

A. Nice terrace property, yes, sir.

Q. To make it adapted for residence purposes it would not be necessary to lower it any?

A. No, sir.

Q. Isn't that also true of most of the property on the east end of this improvement?

A. Further east it didn't, below where—down below I would say the grade had elevated that property above the street.

Q. There is at least half the frontage along the improvement, beginning at the east end, that it is in about the same condition as this was?

A. The average I should say there is in desirable shape.

Q. How near was your lot to the circle?
A. The first street this side of the circle; the northwest corner—first street west of the circle—on the northeast corner.
Q. It don't front on the circle?
A. No.
Q. It fronts on the street this side of it?
A. It fronts on Broad street, facing south.
Q. Some part of the side of that lot is on the circle?
A. No, sir.
Q. None of it?
A. No, sir; I am not on that circle at all.
Q. Not on the circle at all?
A. I am a square west of that; near Josiah Lunn's place.

And also LEONARD CARR, a witness produced on behalf of the defendant, who, being first duly sworn, testified as follows:

115 Examined by Mr. DYER:

Q. Mr. Carr, you recently sold your interest in the Alum Creek Ice Company, and in certain real estate belonging to that company, didn't you?
A. Yes, sir.
Q. At the time you made this sale, I will ask you to state whether or not the assessment for the improvement of East Broad street was considered as a part of the consideration?
A. Yes, sir.
Q. I wish you would explain that to us.
A. Well, when I come to figure up—to make the sale, I asked for the indebtedness, and they gave it to me, and among the rest was this assessment of Broad Street property; I think they told me there was $4500 still back assessment on the property, and they charged me up with $1500, one-third of the assessment, a tax for the improvement on Broad street.
Q. And you permitted them to figure $1500.00 as part of the indebtedness of the ice company for this assessment—your share of this assessment?
A. Yes, sir.
Q. It was settled on that basis, was it?
A. Yes, sir.
Q. In other words, you paid $1500 of this assessment to your grantees?
A. Yes, sir.

Cross-examination.

Examined by Judge PUGH:

Q. The payment of the one-third of the assessment was not all of the consideration for the property?
A. Oh, no; oh, no.

Q. All the consideration is shown by that agreement, is it?
A. No, I don't know as it was, but——
Q. I mean the agreement in writing?
A. I made them an offer of what I would take to pay for all these things and they done that.
Q. Mr. Carr, I want to ask you a question. Did you ever receive any notice in writing, or otherwise, or any invitation in writing or otherwise, to attend a meeting of the board of county commissioners, at which the question as to whether or not the frontage of these lots, or these properties, with the improvement, would be enhanced in value double the amount of the assessment cost?
116 A. No, sir; no notice at all. I may add I objected to the improvement—to an improvement of that kind, but I was in a fix that I could not do anything, because the majority ruled, and the majority was in favor of the improvement. I thought it would cost more than the land was worth, and it is true; I would not take that 250 feet to-day and pay the assessment for it.
Q. You did receive a notice of the application for the improvement of the road?
A. Well, in an indirect way from my own partners, but from no others.
Q. The record shows that there is a notice served on the Alum Creek Ice Company?
A. That all may be, but there was none served on me personally at all.

Re-direct examination.

Examined by Mr. DYER:

Q. Dr. Shepard looked after the business, didn't he, of this improvement?
A. Yes, sir.
Q. He attended a meeting at the commissioners' office didn't he?
A. Yes, sir, I presume he did; I couldn't tell you positively, because I don't know that he did.
Q. He reported to you at different times concerning this improvement?
A. Yes, sir, that is all the information I got, I got from him.
Q. From Dr. Shepard?
A. Yes, sir.
Q. He was a partner?
A. Yes, sir.
Q. He had charge of this part of the business?
A. Yes, sir.
Q. Then Dr. Shepard had, as a partner, full authority had he, from the partnership?
A. Yes, sir, of course.
Q. Mr. Carr, did you not, at the time this improvement was made, know what the assessment cost was?

A. Well, I think they told me it would cost about $6.00 and it turned out to cost about twice that; about double.

Q. $7.25, wasn't it?

A. No, I think not; I think it was only about $6. when I was told. I wouldn't be too positive, but it cost pretty near as much again.

Q. Who gave you that information?

117 A. Well, I got it from the Doctor; all the information I got I got from him.

Q. During the discussions between you and him and possibly Mr. McLeish, concerning this improvement, you say you opposed it?

A. I certainly did.

Q. But Mr. McLeish and the Doctor were in the majority?

A. Yes, they were; they were in the majority, and they ruled.

Q. State, if you can, what they said at that time with reference to the manner in which this improvement would enhance the value of your property.

A. Well, it was to get a good road to haul ice on—that is about all; they supposed it would enhance the value of the property, but I had my doubts about it and still have them.

Q. They didn't have any doubts about the value?

A. I don't know what they had.

Q. What did they say?

A. The supposition was that it would enhance the value of the property.

Q. Was there any talk about that time about the amount it would enhance the value?

A. No, not that I know of.

Re-cross examination.

Examined by Judge PUGH:

Q. When did you first learn that the improvement would cost more than $6.00 a foot front, or about that?

A. Oh, it was—I don't know, after all was finished up probably.

Q. At the time the assessment was made?

A. I think it was about the time the assessment was made.

Q. After the road was all finished?

A. After the road was all finished—after the road was all done.

(Mr. DYER:)

Q. Did you know, Mr. Carr, that some changes in the sewers some additions in sewerage there —, didn't you?

A. No, sir; didn't know until it was all done.

Q. You knew it was being done?

A. I seen it done, yes, sir.

Q. Did you know anything of the circle being constructed in this improvement?

A. No; I know there was one constructed; that is all I know.

118 Q. Wasn't there anything said about constructing a sewer?
A. Not that I know of; there was nothing said to me because I didn't have anything to do with that.
Q. Dr. Shepard represented your partnership?
A. Yes, sir. You see in making a grade there it made it cost us thousands and thousands of loads of dirt there to get to the bridge.

(Judge PUGH:)

Q. Do you know when the sewers were built, Mr. Carr?
A. I don't know the time, but I know they were being built.
Q. Isn't it a fact that they were not built until 1892 a year after this improvement was finished, or have you any recollection on that?
A. No, but I think they were put in afterwards; but I won't be positive.
Q. When did you first learn, if you ever learned at all, that the law under which this improvement was made was claimed to be unconstitutional, Mr. Carr?
A. Oh, I don't know anything about that.
Q. Did you learn it until before this suit was brought?
A. No, sir.

And also EMIL KIESSEWETTER, a witness produced on behalf of the defendant, who, being first duly sworn, testified as follows:

Examined by Mr. DYER:

Q. You may state your name?
A. Emil Kiessewetter.
Q. Please state your business?
A. I am vice president of the Ohio national bank, Columbus, Ohio.
Q. I will ask you to state, Mr. Kiessewetter, whether you remember of purchasing East Broad Street extension bonds sometime during the year '90 or '91?
A. I did purchase the East Broad Street improvement bonds for Messrs. Spitzer & Co.
Q. State whether you recollect anything concerning a waiver that was signed by the property owners for that improvement?
A. Before taking up the bonds and paying them off we required a waiver to be signed by all of the property holders, which was done; and after the waiver had been signed and delivered to
119 us, with the papers substantiating the legality of the issue, we took up the bonds and paid for them.

Question and answer objected to as the papers are the best evidence.

Q. There were two issues of bonds on East Broad street, one for $50,000 and another for $60,000?
A. That is right as far as I remember.

Cross-examination.

Examined by Judge PUGH:

Q. Which issue of bonds did you buy, the $50,000 or $60,000?
A. I can't remember positively, Judge, but I think it was the fifty—the first lot.
Q. Did you buy all of the first issue?
A. Yes, sir.
Q. Do you recollect the waiver? If you saw it would you know it?
A. I would, yes, sir.
Q. Is this it (handing witness "Exhibit A")?
A. As far as I can remember that is the paper.
Q. Do you recollect how long after buying the bonds you paid the money?
A. No, I can't remember just exactly.
Q. Approximate the time?
A. I think it may have been fifteen days or more. The records will show that in the court house.
Q. It wasn't more than a month after the bid was accepted?
A. I think not.
Q. Under whose name did you make the bid and purchase?
A. I don't remember whether it was in the name of the Ohio Savings Bank Company, or whether it was in the name of Spitzer & Co.
Q. It was one of the other?
A. It was one or the other, but the bonds were for Spitzer & Co.
Q. The bid was one or the other?
A. Yes, one or the other.

And also A. D. HEFFNER, a witness produced on behalf of defendant, who, being first duly sworn, testified as follows:

120 Examined by Mr. DYER:

Q. State your name?
A. My name is A. D. Heffner.
Q. Your business?
A. Connected with the First national bank.
Q. State whether or not at any time you were an officer of Franklin county, and if so, during what years?
A. Well, I was treasurer of Franklin county in '85?
Q. To what years? Covering what years?
A. '85 to '89.
Q. I will ask you to state, Mr. Heffner, whether or not you are acquainted with the property of complainants known as the Alum Creek Ice Company, which abuts on what is known as East Broad Street improvement?
A. That is where the ice plant is, on the south side?
Q. Yes.

A. Yes, sir.

Q. I will ask you to state whether or not you are acquainted with the market value of this property, or property in that vicinity, prior to the construction of the improvement, of what is known as East Broad street?

A. Yes.

Q. You may state what in your judgment was the reasonable value of that property, either by the acre or by the foot front, prior to the construction of the improvement?

A. Oh, somewheres from five to six hundred dollars.

Q. I will ask you to state, if you can, what the value of that property was after the improvement was completed? I mean immediately after?

A. Well, the property was very materially increased in value by virtue of this improvement, immediately after the improvement.

Q. Give us your judgment in dollars and cents, if you can?

A. Well, that is pretty hard to do unless you get it from sales that were made out there. I know of sale being made as high as $75 a foot front.

Q. Well, considering the location of this property, its surroundings, etc., state whether or not you consider the foot frontage of this property worth $75 a foot front on that road?

A. No, I don't.

Q. Well, what have you to say on that subject?

A. Your question now is immediately after the improvement?

Q. Yes, sir.

121 A. That is a good ways back; I should think that land ought to have been worth $30 a foot front after the improvement.

Q. State whether or not in your judgment the land could have been sold, after the improvement was made, for what it was worth before the improvement was made, and the grantee assuming the assessment, amounting, the records show, to $11.25.

Question objected to by counsel for complainants.

A. I don't understand, do you mean if the property was worth as much after the improvement was made to pay for the improvement?

Q. Yes, sir?

A. I do, yes, sir.

Q. That is, I mean did you consider the value of the property after the improvement was made increased to the amount of the assessment?

A. I did, yes, sir.

Cross-examination.

Examined by Judge PUGH:

Q. During what years were you treasurer, Mr. Heffner?

A. '85 to '89.

Q. Now, the property you say sold after the improvement was completed, sold for $75 per foot front? Do you refer to the Tracy property—the Tracy lot?

A. Yes.

Q. Isn't that differently situated with reference to the improvement from what the Shepard property is?

A. Oh, my, yes, sir; that is more desirable property.

Q. That at the time it was purchased was in a condition to be used for building purposes at once, without any cost?

A. Yes, sir; very desirable location; very finely located.

Q. Did you know where the Stansberry property was, 570 feet?

A. Yes, sir.

Q. Did you know of half of that selling after the improvement for $1000 an acre?

A. I believe I did, yes, sir.

Q. In estimating the value of this property of complainants did you estimate the value of it before or after the fill was made by the complainants?

A. Well, I estimated it after this improvement was made. There has been some filling done there, I don't know. There is filling going on all the time.

122 Q. Did you see the condition of it immediately after the improvement was finished?

A. Oh, yes, I was out there every few days.

Q. The lots after were depressed away below the roadway, wasn't it?

A. Yes, it is undoubtedly, but I couldn't say how much.

Q. Assuming that the complainants spent $5000 to pay for filling of dirt to make their property accessible, what would it have been worth after that filling had been put in?

Question objected to by counsel for defendant because it is immaterial, and witness has answered his estimate was made on the condition before the improvement.

A. I thought I answered that on the condition per foot front before.

Q. Did you notice that there had been filling done?

A. Oh, yes.

Q. Suppose that filling had not been done, what would it have been worth?

A. I don't think that would change my opinion in my original answer.

Q. You don't think the expenditure of $5,000 to put the filling in there to make it accessible helped the value of the property?

A. It did, unquestionably.

Q. Do you know whether that property was ever subdivided into lots?

A. I don't think it was, not to my knowledge.

Q. You being treasurer at that time you would have heard whether it was, wouldn't you?

A. Well, I wasn't treasurer at the time that improvement was made.

Q. Has that property ever been in condition since the improvement was finished to be used for residence purposes, except right in the center of it?

A. No, sir; there would have to be considerable filling there yet, I think.

Q. Isn't the roadway some 15 or odd feet above the land, most of the distance?

A. Well, no, sir, not that much.

Q. It is at the end?

A. It is when you go back aways.

Q. Right at the bridge, or at east end of the bridge, isn't it?

A. Yes, there is a drop there at the bridge.

Q. You had nothing to do with negotiating the bonds?

123 A. No, sir; I have been trying to collect some of them.

Q. Either as agent for anybody, or yourself?

A. No, sir.

Q. What do you say this property was worth per foot front before the improvement?

A. Oh, I think it was reasonably worth $20.

Re-direct examination:

Q. In regard to the question, Mr. Heffner, Judge Pugh suggested to you concerning the fill which is claimed to have been made by complainants. If the property was filled so as to bring it to grade, would there be any other difference in value of this property per foot front and the property east which is at grade?

A. Well, yes, sir; the property east I think is more valuable, because it is higher.

Q. Would you make any distinction or difference in your statement as to the value after the improvement was made if the property to the depth of 250 feet had been brought to grade by filling?

A. I would probably increase my estimate as to the value.

And also CHARLES MCLEISH, testified as follows in rebuttal:

Examined by Judge PUGH:

Q. Was the property of the complainants ever subdivided into lots?

A. No, sir.

Q. I will ask you whether you ever received any notice in writing, or otherwise, to attend a hearing before the county commissioners of the question of benefits, or of the question as to whether the frontage of the property after the improvement was finished, with the improvement, would double the estimated cost of the improvement?

A. No, sir.

Q. When did you first learn that this assessment was illegal, or the law was unconstitutional?

A. Well, I don't remember that.

Q. About the time?

A. I couldn't answer that intelligently; I don't remember the time.

Q. About when with reference to the time this suit was brought?

124 A. Probably a year.

Q. A year before or a year after?

A. About a year ago was the first knowledge I had; that is only guess work; I don't remember positively at all.

Cross-examination.

Examined by Mr. DYER:

Q. Mr. McLeish, state whether or not you know of any case filed in the State courts wherein the question was raised as to the constitutionality of this act?

A. Only by hearsay, from my neighbors.

Q. You had heard them, hadn't you?

A. I heard some rumors about my friend, Mr. Morrison. I took no interest in it; I don't know when it was.

Q. Prior to that time had you heard of any other person in Franklin county claiming this?

A. I heard repeatedly for some time back, but I could not answer intelligently; I could not tell.

Q. For some time before this suit was brought?

A. I heard it right along; I don't know when this suit was first brought myself.

Certificate to Depositions.

STATE OF OHIO, }
Franklin County, } ss:

I, George L. Stoughton, a notary public in and for the county and State aforesaid, duly commissioned and qualified do hereby certify that the above named Andrew Morrison, Walter H. Martin, Charles McLeish, Thomas J. McLeish, Edward Denmead, E. G. Orebaugh, Dr. William Shepard, Frank Tallmadge, Walter Braun, Charles O. Tracy, Leonard Carr, Emil Kiesswetter, were by me first severally sworn to testify the truth, the whole truth, and nothing but the truth, and that the above depositions were taken in pursuance of an agreement which is attached hereto, as page No. 1 of said depositions, in my presence, and as therein specified.

I do further certify that I am not counsel, attorney or relative of either part-, or otherwise interested in the event of this suit.

In witness whereof I have hereunto set my hand and seal of office this 18th day of June, 1900.

[SEAL.] GEORGE L. STOUGHTON,
Notary Public in and for Franklin County, Ohio.

125 *Cost Bill.*

Notary's fees, chargeable to plaintiff		$49 00
Stenographer's fees, chargeable to p'l't'ff		61 75
Notary's fees, chargeable to defendant		10 05
Stenographer's fees, chargeable to defendant		14 55

Plaintiff's Witnesses.

Andrew Morrison	$1 00	
Walter H. Martin	1 00	
Edward Denmead	1 00	
E. G. Orebaugh	1 00	
Frank Tallmadge	1 00	
Walter Braun	1 00	
	$6 00	6 00

Defendant's Witnesses.

Charles O. Tracy	$1 00	
Emil Kiessewetter	1 00	
A. D. Heffner	1 00	
	$3 00	3 00
Total		$144 35

And afterwards, to wit, on the 19th day of June, A. D. 1900, the following motion was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Motion.

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

WILLIAM SHEPARD ET AL., Complainants, *vs.* O. E. D. BARRON, Treasurer, etc., Defendant. } No. —. In Equity. Motion.

Now come the complainants in the above named suit, by Pugh & Pugh, their attorneys, and file this their motion to suppress
126 the testimony offered by the defendant in this case of a paper writing, beginning with the words: "To the honorable board of county commissioners of Franklin county, Ohio: Whereas on the 31st day of March, 1890, a petition signed by the subscribers hereto was, etc." and ending with the names of Logan M. Bullitt, William Shepard, Charles McLeish and others, and which purports to be a

copy from the records of the county commissioners of Franklin county, Ohio, on the following grounds, to-wit:

1. That there is no proof in the case tending to show that the original of this paper was either lost or destroyed.

2. That there is no proof tending to show that either William Sheperd or Charles McCleish ever signed either the original or any copy of the said paper writing, either on the said records or elsewhere.

PUGH & PUGH,
Attorneys for Complainants.

And afterwards, to wit, on the 19th day of June, A. D. 1900, the following motion was filed in the clerk's office of said court, clothed in the words and figures following, to-wit:

Motion.

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

WILLIAM SHEPHERD ET AL., Complainants,
vs.
O. E. D. BARRON, Treasurer, etc., Defendant.
} In Equity. No. —.

Motion.

Now come the complainants, in the above named suit and move to strike from the testimony offered by the defendant the paper writing, beginning with the words, "To the honorable board of county commissioners of Franklin county, Ohio. Whereas, on the 31st day of March, 1890, a petition signed by the subscribers hereto was, etc.," and ending with the names of Logan M. Bullitt, William Shepherd, Charles McLeish and others, and which purports to be a copy from the records of the county commissioners of Franklin county, Ohio, on the following grounds, to-wit:

127 1. That there is no proof in the case tending to show that the original of this paper was either lost or destroyed.

2. That there is no proof tending to show that either William Shepherd or Charles McCleish ever signed either the original or any copy of the said paper writing, either on the said records or elsewhere.

PUGH & PUGH,
Attorneys for Complainants.

And afterwards, to wit, on the 19th day of June, A. D. 1900, the following motion was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Motion.

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

WILLIAM SHEPHERD ET AL., Complainants, *vs.* O. E. D. BARRON, Treasurer, etc., Defendant. } In Equity. No. —.

Motion.

Now come the complainants, by Pugh & Pugh, their attorneys, and file this their motion to suppress the deposition of Emil Kiesewetter, a witness who was examined by the defendant, on the ground that the purchasers of the bonds, whom the witness testifies that he represented, are not parties to this suit, and therefore the evidence is incompetent, irrelevant and inadmissible.

PUGH & PUGH,
Attorneys for Complainants.

And afterwards, to wit, on the 19th day of June, A. D. 1900, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal D, page 535.

On this 19th day of June, 1900, came on for hearing in
128 open court the application of the complainants and Thomas J. McLeish and Joseph Busch, for an order substituting these last two named, as complainants, for Leonard Carr. It appearing to the court that Thomas J. McLeish and Joseph Busch have acquired by purchase the rights of the complainant Leonard Carr in and to the property described in the bill of complaint, and it further appearing that all the rights of the said Leonard Carr in and to the property described in the bill of complaint have been transferred to the said Thomas J. McLeish and Joseph Busche and that they are necessary and proper parties complainants, and the defendant consenting thereto, it is ordered that the said Thomas J. McLeish and Joseph Busch be, and they are hereby, substituted as complainants in the above suit for the said Leonard Carr.

And it is further ordered that this suit shall proceed in their name instead of in the name of the said Leonard Carr.

And afterwards, to wit, on the 19th day of January, A. D. 1901, the following opinion was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Opinion of Judge Thompson.

United States Circuit Court, Southern District of Ohio, Eastern Division.

WILLIAM S. SHEPHERD, CHARLES MCLEISH, and LEONARD CARR, Complainants,
vs.
O. E. D. BARRON, Treasurer of Franklin County, Ohio, Defendant.
No. 924.

This is a suit to enjoin the collection of the remaining installments of an assessment made by the county commissioners upon the lands of the complainants, for the improvement of a street or highway, called in the petition the "improvement of East Broad street," and which practically was the extension of one of the streets of the city of Columbus, Ohio, into adjacent or suburban territory. It was authorized by a special act of the General Assembly of Ohio,
129 passed March 26th, 1890 (87 O. L. 113). The act provided that upon the petition of the "property owners representing a majority of the feet frontage" the county commissioners might, after due notice to the public, and to all the property owners, authorize the improvement, issue bonds to provide for the payment of the costs and expenses thereof, and assess the abutting property by the feet front for the payment of the bonds.

It further provided that the assessment should be a lien upon the abutting property; should be payable in installments, and should be placed upon the tax duplicate for collection.

It further provided that no action should be taken by the commissioners for the improvement until they were satisfied, by personal inspection and examination that with the improvement the foot frontage of the abutting lands would be worth double the estimated expenses of the improvement, "which inspection, examination and estimate, together with their valuation per foot front of said lands," should be made a matter of record.

It further provided that a contract for the improvement should be made by the commissioners, the performance of which should be supervised by a board of improvement appointed by the county commissioners, consisting of two or more owners of the abutting property, and the county surveyor, who were authorized to elect a superintendent to see that the contract was performed according to its true intent, and that all orders of the county surveyor in furtherance thereof were obeyed.

The improvement was duly authorized May 3, 1890. A contract for the work was duly made; a board of improvement was appointed, a superintendent elected, and after a number of changes in the original plan the work was completed on the first of October, 1891. Bonds were issued to the amount of $110,000. The number of feet

front on the improvement owned by the complainants is 9,615.38 feet. The assessment was made October 15, 1891, of which the complainant's proportionate part amounted to $12,812.61.

It is claimed that the collection of the assessment will be a taking of private property for public use, without due process of law, in violation of the fifth and fourteenth amendments to the Constitution of the United States, first, because the method of assessment by the front foot necessarily excludes the consideration of special benefits to the abutting property. Second, because the evidence in fact shows that the assessment against the complainants largely exceeds the special benefits to the abutting property of the complainants.

130 Of the several matters of defence to these claims, I shall consider but one—that of estoppel.

From about 1888 to 1891 there was a "boom" in real estate in the vicinity of the improvement in question, caused by the somewhat large purchases of land by the Philadelphia syndicate, so called, with a view of laying out suburban places or additions to the city. Under the influence of the "boom," the extension and improvement of East Broad street was projected and undertaken to further enhance the value of the lands for building purposes. But the "boom" flourished for a time, and then collapsed, leaving the lands greatly depreciated in value and subject to the burden of a heavy assessment for the cost of the improvement. This burden, however, was borne by the complainants for seven years, and until $8,810.27 of the assessment had been paid, and there remained unpaid but $4002.34. About this time the case of Baker *vs.* Norwood was decided by the Supreme Court of the United States, in which it was held that the method of levying assessments by the front feet necessarily excluded the consideration of special benefits to the property abutting on the improvement, and soon after this suit was brought to enjoin the collection of the balance of the assessment.

The original complainants were partners doing business under the firm name of the Alum Creek Ice Company.

The ice company owned, of the frontage on the improvement, 9615.37 feet. The ice company joined in the petition to the county commissioners for the improvement, and during the progress of the improvement was represented by either Shepard or McLeish, usually by Shepard, who had full authority to represent the firm. Shepherd is a man of prominence, being a physician of good standing, and having served in the General Assembly of Ohio. He was appointed and served as a member of the board of improvement and took an active part in promoting the improvement from the beginning to the end.

On behalf of the company he signed the petition for the improvement and read and understood the law under which the action of the county commissioners was invoked. He knew that the law provided for an assessment of the abutting property by the front foot, for the payment of the cost of the improvement.

On the 29th of June, 1891, the Columbus Land Association, in

order to settle all controversy about the continuation of the improvements of East Broad street from Alum creek to Cassady road, proposed in writing to the county commissioners that if the im-
131 provement was pushed through to completion without delay they would pay the entire expenses in removing the earth from the circle and in beautifying and adorning the circle, and the ice company, through Shepherd, joined with other property owners in signing the following writing:

"The undersigned owners of real estate abutting upon the extension of East Broad street, now being improved under proceedings by and before this board of county commissioners of Franklin county, hereby withdraw all objection to said improvement and the assessment of their said real estate therefor, on condition that the foregoing agreement shall be kept by said Columbus Land Association."

On September 2, 1891, on behalf of the ice company, Shepherd signed a petition to the county commissioners to release the contractor, N. B. Abbott, from sodding the sides of the improved roadways, offering to sow grass thereon instead of sodding.

On September 26, 1891, Shepherd, for the ice company, signed an agreement marked "Exhibit A," which, after reciting the loss of the papers in the case, and the action of the commissioners from time to time, concluded as follows:

"Now in consideration of said improvement and in order that the bonds to be issued to pay for said improvement may not lie under suspicion, or remain unsold by reason of the absence or loss of said original papers, we hereby agree that said petition — hereinbefore recited was filed, signed by us as herein stated, and that we will not set up as a defense against any assessment upon our said property abutting upon said improvement for the payment of bonds issued on account thereof, any informality arising from the absence or loss of any of said papers, but agree that said improvement was legally made and constructed."

Shepherd and McLeish also signed, on behalf of the ice company, a petition to the county commissioners, praying them to cause the bonds issued for the payment of the expenses of the improvement to be made payable twenty years from date, and also praying them, if possible, to have the time of the bonds already sold extended to twenty years, and Shepherd, as a member of the board of improvement, for the same purpose, signed a paper which reads as follows:

"Whereas, the property owners on the East Broad St. improvement have petitioned the hon. board of county commissioners to take steps to have the bonds for said improvement extended so as to run
132 twenty years. Now, therefore resolved, that the board for the improvement of said street hereby respectfully request the county commissioners to do all in their power to carry out the prayer of said petition."

And after the improvement was completed McLeish, for the ice company, in connection with other property owners, signed a petition to the county commissioners to lay sewer pipe in the improvement, in which they agreed "that the expense of said work be as-

sessed against our respective property on said street, the same as other expenses for making said improvement are levied and paid," showing that after the assessment for the improvement had been made and they knew what it was and how it was made, they were still willing to be further assessed to perfect the improvement. An examination of the exhibits attached to the testimony will show more fully the conduct of the complainants during the progress of the improvement.

The complainants invoked the action of the county commissioners to enhance the value of their land; they actively promoted the improvement knowing that it- cost must be paid by a front foot assessment on their property; they recognized the justice of the assessment from time to time during the progress of the work, and afterwards by paying annual installments of the assessment for seven years, and until they were tempted by the decision of the Supreme Court, in Baker *vs.* Norwood, to cast their burden upon the general public, and it is now too late to complain of the method of the assessment or of the lack of the special benefits which were dissipated by the collapse of the "boom." The complainants, Thomas McLeish and Joseph Busch, who purchased the interests of the original complainant, Carr, under the agreement offered in evidence, assumed the payment of the assessment as a part of the purchase money, and are liable for the unpaid installments thereof.

The bill will be dismissed at the costs of the complainants.

And afterwards, to wit, on the 19th day of January, A. D. 1901, the following entry was made on the journal of said court, clothed in the words and figures following, to wit:

Journal E, page 89.

Entry.

This day this cause came on for hearing upon the pleadings and testimony filed herein, and was argued by counsel and submitted to the court; whereupon, upon consideration, it is ordered that this cause be and the same hereby is dismissed at the costs of complainants. To which ruling complainants, by counsel excepts.

133 And afterwards, to-wit, on the 2nd day of January A. D. 1903, the following petition of appeal was filed in the clerk's office of said court clothed in the words and figures following, to-wit.

Petition for Appeal.

United States Circuit Court for the Southern District of Ohio, Eastern Division.

WILLIAM S. SHEPARD, CHARLES MCLEISH, and Leonard Carr, Complainants,
vs.
O. E. D. BARRON, Treasurer of Franklin County, Ohio, Defendant.
} No. 924. In Equity.

Petition for appeal.

Now comes William S. Shepard, Charles McLeish and Leonard Carr, complainants herein, and conceiving themselves to be aggrieved by the decree made and entered on the 19th day of January, 1901, in the above entitled cause, do hereby appeal from said order and decree to the United States Supreme Court, for the reason specified in the assignment of errors, which is filed herewith, and they pray that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order was made and decree rendered, duly authenticated, may be sent to the United States Supreme Court.

PUGH & PUGH,
Attorneys for Complainant.

134 And afterwards, to wit, on the 2nd day of January A. D. 1903 the following assignment of errors was filed in the clerk's office of said court clothed in the words and figures following, to-wit.

Assignment of Errors.

In the United States Circuit Court, Southern District of Ohio, Eastern Division.

WILLIAM S. SHEPARD, CHARLES MCLEISH, and Leonard Carr, Complainants,
vs.
O. E. D. BARRON, Treasurer of Franklin County, Ohio, Defendant.
} No. 924. In Equity.

Assignment of errors.

And now comes William S. Shepard, Charles McLeish, and Leonard Carr, complainants herein, and says that the decree, in said cause, dismissing the same, is erroneous and against the just rights of the said complainants, for the following reasons:

First. The court erred in refusing to find and adjudge that the assessment upon the property of the complainants, set out fully in their bill, was illegal.

Second. The court erred in refusing to find and adjudge that the said assessment was in excess of the special benefits conferred upon the property of the complainants by the improvement to pay the cost for which the assessment was levied.

135 Third. The court erred in refusing to find and adjudge that the said assessment was levied in violation of the constitutional rights of the complainants, in this, that it violated the provisions of section 1 of the fourteenth amendment to the Constitution of the United States.

Fourth. The court erred in refusing to find and adjudge that the statute of Ohio, under which said assessment was levied, entitled, "An act to authorize county commissioners in counties in which there are situated cities of the first grade of the second class, to improve roads extending from such cities, and other roads and streets in certain cases," passed March 26, 1890, and published in volume 87 Ohio Laws, page 113, and the following pages, was void, because it violated the provisions of section 1 of the fourteenth amendment of the Constitution of the United States.

Fifth. The court erred in finding and adjudging that the complainants were, by their conduct, estopped from maintaining this suit, and claiming the relief prayed for in their bill.

Sixth. The court erred in refusing to issue an injunction restraining the defendant, and his successors in office, as treasurer of Franklin county, Ohio, from collecting that part of the said assessment which is unpaid, by action, suit or otherwise.

Seventh. The court erred in refusing to quiet the title of the complainants, to their property, mentioned and described in their said bill, against the illegal lien of said assessment.

Eighth. The court erred in dismissing the suit of the complainant-, and entering judgment for costs.

136 Ninth. The court erred in not entering a judgment, and rendering a decree in favor of the complainants, as prayed for in their said bill.

Tenth. The court erred in refusing to find and adjudge that the said assessment, if collected, would amount to a confiscation of the complainants' property upon which it was levied.

PUGH & PUGH,
Attorneys for Complainants.

137 And afterwards, to-wit on the 2nd day of January A. D. 1903, the following appeal was filed in the clerk's office of said court clothed in the words and figures following to-wit:

Appeal Allowed.

WILLIAM SHEPARD, CHARLES MCLEISH, and Leonard Carr, Complainant-,
vs.
O. E. D. BARRON, Treasurer of Franklin County, Ohio, Defendant.
No. 924. In Equity.

Appeal allowed.

This 2nd day of January, 1903, came the complainants, by their attorneys, and filed herein and presented to the court their petition praying for an allowance of an appeal, and the assignment of errors intended to be urged by them, and praying also that a transcript of the record and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Supreme Court, and that such other and further proceedings may be had as may be proper in the premises; and praying also that the decree rendered by the court against the complainants may be superseded and stayed until the hearing of this cause in said United States Supreme Court. On consideration whereof the court does allow the appeal on the complainants giving bond according to law in the sum of ten thousand dollars.

138 And it is further ordered that said bond shall act as a supersedeas bond as well as a bond for cost and damages on appeal; and upon the execution of said bond, the decree dissolving the injunction previously granted to them and dismissing this suit of the complainants, shall be suspended and stayed until the determination of said appeal by the said United States Supreme Court.

139 And afterwards, to-wit, on the 8th day of January A. D. 1903, the following appeal bond was filed in the office of said court, clothed in the words and figures following, to-wit.

Appeal Bond.

WILLIAM SHEPARD, CHARLES MCLEISH, and Leonard Carr, Complainants,
vs.
O. E. D. BARRON, Treasurer of Franklin County, Ohio, Defendant.
No. 924. In Equity.

Appeal bond.

Know all men by these presents, that we, William Shepard, Charles McLeish, Thomas McLeish and Joseph Bush, as principals, and W. H. Tuthill and F. G. Hatton, as sureties, are jointly and severally

held and firmly bound unto the above named O. E. D. Barron, treasurer of Franklin county, Ohio, or his successor in said office, in the sum of ten thousand ($10,000.00) dollars, lawful money of the United States of America, to be paid to the said Nelson A. Sims, as treasurer of Franklin county, Ohio, his successor in said office, for which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors, administrators and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 5th day of January, in the year of our Lord one thousand nine hundred and three.

140 The condition of the above obligation is such that, whereas, said William Shepard, Charles McLeish, Thomas McLeish and Joseph Bush have taken an appeal to the United States Supreme Court to reverse the final decree made — entered by the circuit court of the United States, sixth judicial circuit, in and for the southern district of Ohio, eastern division, which decree was made and entered in the above entitled suit on the 19th. day of January, A. D. 1901.

Now, therefore, the condition of the above obligation is such that if the above named William Shepard, Charles McLeish, Thomas McLeish, and Joseph Bush, complainants herein, shall prosecute said appeal to effect, and answer all damages and costs, and if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

WILLIAM SHEPARD.
CHARLES McLEISH.
THOS. McLEISH.
JOSEPH BUSH.
WM. TUTHILL.
T. G. HATTON.

Approved:

A. C. THOMPSON,
Judge of the United States District Court for the Southern District of Ohio, Sitting and Holding United States Circuit Court.

141 SOUTHERN DISTRICT OF OHIO, *ss:*

I, W. H. Tuthill, one of the sureties above named, do solemnly swear that, after paying my just debts and liabilities, I am worth fifteen thousand dollars in real estate in my own name, situate in the county of Franklin, in said district.

[SEAL.] W. H. TUTHILL.

Sworn to before me the 5th day of January, 1903.

C. P. WHITE,
Deputy Clerk U. S. Courts, S. D. O.

SOUTHERN DISTRICT OF OHIO, *ss:*

I, F. G. Hatton, one of the sureties above named, do solemnly swear that, after paying my just debts and liabilities, I am worth ten thousand dollars in real estate in my own name, situate in the county of Franklin, in said district.

[SEAL.] W. G. HATTON.

Sworn to before me the 5th day of January 1903.

C. P. WHITE,
Deputy Clerk U. S. Courts, S. D. O.

141½ The United States Circuit Court.

SOUTHERN DISTRICT OF OHIO, *Eastern Division,* } *ss:*

I, Benjamin R. Cowen, clerk of the circuit court of the United States of America, within and for the division and district aforesaid, do hereby certify that the foregoing is a full, true and complete transcript of the proceedings had by and before said court, in the above entitled cause, as the same appears of record and on file in the clerk's office of the court aforesaid.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at the city of Columbus, Ohio, this 9th day of January A. D. 1903, and of the American Independence the one hundred and twenty-seventh.

Attest:—

[Seal of the Circuit Court, South'n Dist. of Ohio.]

B. R. COWEN, *Clerk,*
By JANIE W. F. COWEN,
Deputy Clerk.

142 THE UNITED STATES OF AMERICA, *ss:*

To O. E. D. Barron, treasurer of Franklin county, Ohio, Greeting:

Whereas, William Shepard, Charles McLeish Thomas McLeish and Joseph Bush have lately appealed to the Supreme Court of the United States, from a decree lately rendered in the circuit court of the United States for the southern district of Ohio, eastern division made in favor of you, the said O. E. D. Barron, treasurer, as aforesaid, and *has* filed the security required by law; you are, therefore, hereby cited to appear before the said Supreme Court, at the city of Washington, on the second Monday of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of Columbus, in the sixth circuit, this 8th day of January in the year of our Lord one thousand nine hundred and three.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

A. C. THOMPSON,
Judge of United States District Court for Southern District of Ohio, Sitting and Holding United States Circuit Court.

143 [Endorsed:] United States circuit court, No. 924. William Shepard *et al.* — O. E. D. Barron treasurer of Franklin Co. Ohio. Citation to appellee. Filed Jan'y 8, 1903 B. R. Cowen clerk.

For O. E. D. Barron, treasurer &c., respondent in the cause pending in the circuit court of the United States for the southern district of Ohio, eastern division of said district, wherein William Shepard, Charles McLeish, Thomas McLeish and Joseph Bush are complainants and said Barron as treasurer of Franklin county, Ohio, is respondent, mentioned in the foregoing citation, we waive service of the said citation and agree to enter appearance in the Supreme Court of the United States, in said cause.

January 7th 1902

DYER, WILLIAMS & STOUFFER,
TAYLOR, SEYMOUR & WEBBER,
Attorney- for said O. E. D. Barron, Treasurer, &c.

Endorsed on cover: File No. 18833. S. Ohio C. C. U. S. Term No. 217. William Shepard, Charles McLeish, Thomas McLeish, and Joseph Bush, appellants, *vs.* O. E. D. Barron, treasurer of Franklin county, Ohio. Filed February 16", 1903.

2023

Office Supreme Court U. S.
FILED
MAR 7 1904
JAMES H. McKENNEY,
Clerk.

(18,833)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 217.

WILLIAM SHEPARD, CHARLES McLEISH, THOMAS McLEISH AND JOSEPH BUSCH,

APPELLANTS,

VERSUS

O. E. D. BARRON, TREASURER OF FRANKLIN COUNTY, OHIO,

APPELLEE.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

BRIEF FOR APPELLANTS.

PUGH & PUGH,
Attorneys for Appellants.

F. B. TOOTHAKER, Law Printer, 81-87 N. Third St., Columbus, O.

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(18,833)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 217.

WILLIAM SHEPARD, CHARLES McLEISH, THOMAS McLEISH AND JOSEPH BUSCH,

APPELLANTS,

VERSUS

O. E. D. BARRON, TREASURER OF FRANKLIN COUNTY, OHIO,

APPELLEE.

Appeal From the Circuit Court of the United States for the Southern District of Ohio.

BRIEF FOR APPELLANTS.

The original complainants in this suit, were William Shepard, Charles McLeish and Leonard Carr. Since 1878, until a short time after this suit was begun, these complainants owned a tract of about forty acres of land situated in this county, just outside of the corporation limits of Columbus, on

East Broad street. At the last named time Carr sold and transferred his interest to Thomas McLeish and Joseph Bush, who were substituted in place of Carr. The defendant is the treasurer of this, Franklin county, Ohio.

March 26, 1890, the legislature enacted a law which authorized county commissioners in certain counties, this being one of them, to improve roads which extended from cities in said counties, and which had been paved therein, by paving them with granite, or other stone block, asphalt or other permanent material. (87 Ohio L., 113).

This statute also authorized and commanded the county commissioners to assess the cost of such improvements equally on the abutting property by the foot front, to not a greater depth than two hundred and fifty feet. It also authorized them to issue bonds to pay for the cost, to be paid out of the assessments.

The most pertinent sections of the statute, are as follows:

Section 1. Be it enacted by the General Assembly of the state of Ohio, that in counties in which there are cities of the first grade of the second class, county commissioners shall have authority to cause any of the streets or avenues, or parts thereof of said cities which may have been paved with granite or other stone block asphalt or other permanent material to the limits of said city, to be extended beyond the limits of said cities and improved by paving as aforesaid, or to cause any other road or street within said counties to be so improved upon the following conditions, to wit:

Section 2. The property owners of lands fronting upon such road, street or streets being desirous of having said road, street or streets extended and so improved beyond the limits of said cities, or any other road, street or streets within such counties so improved, shall petition said commissioners to have said street or streets extended, widened and so improved, as

called for in said petition; said petition shall state therein with what material said street shall be paved, provided with sidewalks, gutters and other passages for carrying off the water, and stating therein to what point on said road or street said improvement is to be extended, or between what points on such other road or street such improvement is to be made. No petition for the improvement of any road or street under the provisions of this act shall be favorably considered by said commissioners unless it is signed by the property owners representing a majority of the feet frontage of the lands abutting upon said road or street, between the city limits mentioned therein and the point designated in said petition where said improvement shall stop, or the points upon such other road or street where said improvement shall begin and end, and the distance between such points shall be mentioned by the number of feet upon the line of said road or street.

Section 3. Whenever the commissioners of such county shall receive such petition, they shall appoint a time and place for the hearing of said application, not less than four weeks thereafter, publish a notice of such hearing in some newspaper of general circulation in the vicinity of the proposed improvement, for not less than two consecutive weeks, once each week, and cause service of said notice to be given to all owners of property fronting upon the proposed improvement, their agents or attorneys, at least two weeks before said hearing.

Section 4. All owners of lots or lands bounding or abutting upon the proposed improvement claiming damages therefor, shall file a claim in writing with said county commissioners, setting forth the amount of damages claimed, together with a description of the property owned for which the claim is made, within one week after the expiration of the time required for (the) publication of said notice, and all such as shall fail or neglect to file their claim for damages aforesaid, within the

time aforesaid, shall be deemed to have waived the same, and be forever barred from filing any claim or recovering any damages therefor.

Section 5. Upon the day appointed for said hearing, if no claim for damages or for appropriations have been filed, or if whatever claims have been filed are allowed by the commissioners as hereinafter authorized, the hearing may proceed, and if, upon such hearing, the county commissioners shall be satisfied that the owners of a clear majority of the feet front of land abutting upon said proposed improved roadway favor said improvement, and that the proposed improvements are judicious, it shall be their duty to declare said improvement authorized and established, and to declare the width of said road legalized and established, as of the dimensions and manner as prayed for in said petition, and to make a permanent record of their said action. When said action is taken by the county commissioners they shall immediately notify the county surveyor of their action; said commissioners shall have authority to allow claims as presented or as may have been acted upon. They shall also have authority to sit as arbitrators, and hear all claims arising out of such proposed improvements. They may subpoena witnesses and hear testimony, and upon final hearing shall find and determine the amount, if any, fairly due the claimant, or that claimant is entitled to no damages, *and their finding shall be conclusive.*

Section 6. It shall be the duty of the county surveyor, upon receiving such notice from the county commissioners that such a road has been widened, or other improvements authorized, to survey such road, erect stakes or monuments in front of each piece of property, marking the outside lines of such road so widened or extended, and do whatever other work (may be) necessary for said improvement, as ordered by said commissioners. *It shall be the duty of said commissioners to assess*

all claims allowed by them for the establishment and widening of said street or streets upon the property fronting on such road so improved by the foot front. All other expenses for said improvement, except building bridges and culverts, which shall be paid out of the county bridge fund, shall be paid for and assessed upon the property abutting upon said street, *not however, to a greater depth than two hundred and fifty feet,* in accordance with the various provisions of law now enacted or hereafter enacted applicable thereto, and not inconsistent with this act."

In May, 1890, the county commissioners of this county ordered Broad street, which was then paved with asphalt in this city, to be extended about 4300 feet beyond the city limits, by paving it with asphalt. In the month of August they contracted for such paving; by October 1, 1891, the improvement was completed; and a short time after this the cost of the improvement was assessed upon the abutting property.

The frontage of appellants' property was 1119 feet, and it was assessed with $12,586.07. This parcel of land, 1119 feet long and 250 feet wide, contained 6 42-100 acres. The assessment levied on it amounted to $1960.45 per acre. This property was country property; it has never been subdivided into lots; it has never had any improvement on it, except a few shells of buildings used for ice houses. (Page 99, of Record). *The assessment was tantamount to a confiscation of the property. At the time of the assessment it was not worth as much as the amount of the assessment, nor has it been worth that much at any time since then.*

The appellants have paid on the assessment in principal $8810.27, and they have paid interest on the assessment $3170.95, making a total of $11,981.22. There is remaining unpaid of said assessment $4002.34, with some interest. The object of this suit is to obtain a release from the payment of the balance of the assessment.

The court will observe, from this statement, which will not be controverted, that our clients are not persons whose property has been benefited by a public improvement, and who are seeking to make the public pay the expense and cost of it.

ERRORS OF THE CIRCUIT COURT.

The decision of the Circuit Court was adverse to the complainants below, the appellants here.

The court refused to adjudge that the assessment was illegal; or that it was a violation of the constitutional rights of the appellant. It found and determined that the appellants were estopped, by their conduct, from maintaining their suit, and for that reason, and that reason alone, dismissed their bill.

These conclusions of the Circuit Court have been assigned as errors.

I.

THE ASSESSMENT WAS ILLEGAL.

We claim that the assessment was illegal, and that the law under which it was levied was unconstitutional. We claim that the property of the appellants, under the guise of an assessment, was taken for public use without just compensation. We claim that the assessment was so ascertained and levied that the complainants were denied due process of law. We claim that the assessment exceeded, by several thousand dollars, all possible special benefits derived from the improvement by the land. We claim that the property of appellants was confiscated.

The evidence in the record conclusively proves that the assessment exceeded, by several hundred dollars per acre, the actual market value of the property of appellants assessed.

The assessment was levied by the foot front rule. After making the admission that it was assessed by the foot front, the answer alleges that it was also levied according to special benefits.

Our first answer to this contention of the defendant is, that an assessment levied by the arbitrary mode of foot frontage, could not have been levied according to special benefits. These two facts are irreconcilable; in an assessing process they can not coexist and cohere.

In the Norwood vs. Baker case, 172 U. S., 269, the assessment was levied by the foot front method. The village of Norwood had the option to levy it by that mode, or by the ad valorem mode, or in proportion to special benefits. The first named method was adopted.

Justice Harlan said:

"The assessment was in itself an illegal one, because it rested upon a basis that excluded any consideration of benefits." This is so plain that argument is unnecessary. The levy of an assessment by the arbitrary mode of foot frontage in itself imports that special benefits were not, and could not have been, considered.

The case of Fay vs. Springfield, 94 Fed. Rep., 409, furnishes an apt illustration. The assessment was levied by the foot front rule. After quoting from an opinion of the Supreme Court of Missouri, Judge Philips said:

> "Language could not more forcibly emphasize the fact, not only that the front foot rule is arbitrary, regardless of the respective benefits to the property touched, but that it admits of no contention that the party assessed is not benefited at all."

The defendant, in his answer, explains what he means by claiming the assessment was made according to special benefits. The seventeenth section of the statute contains this provision:

> "In no case shall said commissioners take action for the improvement of any road under the provisions of this act, until after they shall have made a personal inspection and examination of the line of said proposed improvement, and are satisfied that with such improvement the foot frontage of the land abutting thereon will be well worth double the estimated expense of said improvement, which inspection, examination and estimate, together with their present valuation per foot front of said land shall be by said commissioners made a matter of record, and no improvement shall be by them ordered, unless said record justifies it."

But this did not authorize them to make the assessment in proportion to special benefits.

The eighth section ordained the mode of making the assessment. The last half of the section reads:

> "When the whole work is done, the amount of the bonds sold to pay for the same and the interest thereon to the next interest day, when the assessment can be collected as hereinafter provided to pay the same, shall be taken as the cost of the said improvement, to be paid by the abutting property owners, *and that amount shall be assessed equally by the foot front on property fronting or abutting on the said improvement.*"

Section 6 contains a similar mandate.

But even, if these provisions were absent from the eighth and sixth sections, the seventeenth section does not contain a single feature of a law requiring an assessment to be made in proportion to special benefits. It did not require the commissioners to determine what special benefits would be conferred upon the property by the improvement. It did require them to determine whether the frontage of the lands with the improvement, would be worth double the estimated cost of the improvement. The commissioners, in this case, made a finding that the frontage of the land was worth on an average, $20 per foot, before the improvement, and that it would be worth, on an average, $40 per foot front after the improvement was made. That was not a compliance with the statute.

But suppose it was; it was not an assessment of the property according to special benefits. For aught that anyone knows, the commissioners may have reached the conclusion that the frontage would be worth $40 a foot after the improvement, *on the ground that the general benefits derived from the improvement would enhance its value to that extent.*

The Supreme Court of Ohio, in Chamberlain vs. Cleveland, 34 Ohio St., 551, furnished the test for determining whether special benefits were considered in making an assessment.

The assessing officers, the court said, must undertake to determine the *amount, the value,* of the special benefits conferred, both in respect to the *amount assessed and the apportionment of the burden.*

On page 567, Judge Gilmore said that the only thing in the city council's record which indicated that this had been done, was in the report of the assessing board that the assessment is "upon property benefited." And then he adds this comment:

> "But this, of itself, is of no effect. It lacks the essential elements of valuation and apportionment, above spoken of, without which the assessment may be arbitrary and oppressive. Presumption, if permitted in favor of the validity of any part of the proceedings, cannot be permitted to supply the essential elements of a valid assessment that are wanted here."

II.

THE STATUTE DEPRIVED THE PROPERTY OWNERS OF DUE PROCESS OF LAW.

But there is still another answer to the claim that this statute provided a mode for assessing the property in proportion to benefits. There is no provision made by the statute anywhere for notice to the property owners and for an opportunity to them to be heard and make objections on the question of benefits; nor is there any authority conferred upon the commis-

sioners to receive and consider evidence on that question. The guaranty of due process of law was violated by the statute.

We maintain the principle, and so plant ourselves firmly upon this proposition, that somewhere in the statutory proceof assessing by the proper officials, sometime before the amount of the assessment is finally and irrevocably fixed, the statute must provide for notice to be given to the owners and for an opportunity for them to be heard and make objections. In some form or manner they must be allowed to defend their interests. As the liability to pay assessments, when laid, is the most peremptory of all pecuniary liabilities, it is most important, that the assessment which is the basis of said liability, and which determines its amount, should not be fixed irrevocably, without notice, and without opportunity, to be heard. If a statute should authorize a judgment to be recovered by which the defendants' property would be liable to seizure on execution, without any notice to him, or opportunity to defend himself, the statute would be confessedly void as being without due process of law. So also a statute which authorizes an assessment to be made, by which the property owner's property becomes liable to sale, without any notice to him, or an opportunity to be heard, or any means given to him for allegation, review or correction, would be equally void. The two cases are not only parallel; they are identical.

We insist that a statute which authorizes a board of county commissioners, in the first instance, as this statute did, to lay an assessment upon an owner's property, without giving him any notice, or an opportunity to be heard, to make allegations or suggest corrections, which makes that assessment final and conclusive, which provides no mode of review or appeal on his behalf, which thus puts him absolutely at the mercy of the arbitrary discretion of the board; which fixes upon him a liability before he has any knowledge, or means of knowledge, of

its extent, and from which there is afterward no escape, and ch may be enforced by judicial sale of his property—such a tute violates the constitutional guarantee—it deprives the ner of his property without due process of law. This conclusion is self-evident, unless the power of assessment is without restriction, is uplifted above constitutional prohibitions, and the property owner is without redress and protection.

The other side will probably argue that the statute does make provision for notice and hearing. Section 3 of the act will be appealed to. It reads:

> "Whenever the commissioners of such county have received such petition" (that is, the petition for the improvement) "they shall appoint a time and place for the hearing of said application, * * * publish a notice of such hearing in some newspaper, * * * and cause service of said notice to be given to all owners of property fronting upon the proposed improvement, their agents or attorneys, at least two weeks before said hearing."

It is obvious that this section only makes provision for notice and hearing of the application for the improvement of the road or street. It is silent as to notice and hearing of a question of assessment in proportion to the benefits. Besides, Section 17, in express terms, excludes the right to hear any evidence, or objections. It expressly requires the commissioners to make a personal inspection and examination of the line of the proposed improvement. It is upon, and from, this personal inspection and examination that they must form their conclusion. The statute is dumb on the subject of hearing evidence by them, or the offering of evidence by any property owner. Neither Section 3, nor Section 17, gives the property owner an opportunity to file objections, to make suggestions, or offer evidence.

The statute is, moreover, silent on the subject of the review of, or appeal from, the conclusion of the commissioners upon the question, whether the property has been benefited, or whether the frontage, with the improvement, would be worth

double the estimated expenses. Due process of law was denied to these complainants by this statute.

The case of Charles vs. City of Marion, 98 Fed. Rep., 166, illustrates this argument. The controversy was about the assessment for the cost of improving an old and established street. The provision for levying the assessment was that the council should cause a final estimate of the total cost to be made by the city engineer; that the engineer should report to the council the total cost, the average cost per running foot front, the name of each property owner, the number of front feet owned by each, and the amount of cost due upon each lot or parcel of ground. The amount was required to be ascertained by multiplying the average cost price per running front foot by the number of running front feet of the several parcels of ground chargeable. Next, the council was required to give notice of the time and place of hearing of said estimate before a committee of the council. The committee was required to make a report recommending the adoption or rejection of the estimate, which the council was at liberty to adopt, alter, or amend. Superficially, this would seem to provide for notice and an opportunity to be heard. But Judge Baker did not so conclude. He said:

> "It is suggested in argument that the notice and hearing above provided for is such notice and hearing as constitute due process of law. * * * The statute does not purport to confer authority upon the common council to institute an inquiry de novo, and to hear witnesses and consider testimony for the purpose of fixing the assessment upon the basis of the actual benefits received by the property of the land owner by the construction of the public improvement. It is elementary that the constitution authorizing the assessment and levy of taxes is not self-executing. It must be carried into execution by appropriate legislation, and no taxing officer or taxing body can make a valid assessment, unless they pursue with reasonable strictness the precise method prescribed by the statute.

There is no provision of the statute of this state called to the attention of the court which points out the method, or confers authority upon a common council to hear and determine the question of actual benefits received by the property of the land owner by the construction of a street improvement. It is not sufficient to constitute due process of law, that the statute provides for a hearing and notice. It is essential to due process of law that there should not only be notice of a time and place for a hearing, but, more important, that there should be a tribunal clothed with power by methods and rules prescribed by law, to hear and determine the question involved. If the hearing had before the common council was to determine the benefits actually received by the property owner, it is strange, indeed, that the statute commands the engineer to make and report his assessment and estimate upon a basis which wholly disregards, *and in effect, forbids his considering the question of benefits at all.* In my opinion, there is no provision of the statute that provides a tribunal and clothes it with power, and points out the method of its procedure, with the purpose of ascertaining and determining the benefits actually received by the property of the land owner by the construction of a street improvement."

This is a perfect photograph of the statute under which the assessment in question was levied. That statute makes no provision for notice and hearing of the question of benefits; it does not clothe the commissioners with power, by methods and rules, to hear and determine that question.

The evidence of Walter Braun, the engineer, shows that he was the officer who, like the Indiana engineer, made the assessment. He extended the assessment on the assessment roll; and he did it by computing the assessment against each property owner in the proportion that the linear feet of his frontage bore to the linear feet of the frontage of all the parcels of land assessed. (Page 85, of Record). He made the assessment upon a basis which wholly disregarded, and in effect, forbade his considering the question of benefits at all.

One of the questions decided by the United States Court, in Indiana, was decided by another court, as far back as 1882.

We allude to the case of the County of San Mateo vs. The Southern Pacific Railroad Company, 13 Fed. Rep., 722, decided by Justice Field and Judge Sawyer. The seventh paragraph of the syllabus is couched in this language:

> "Whatever the character of the proceeding by which one is deprived of his property, whether judicial or administrative, and whether it takes the property directly, or creates a charge or liability which may be the basis of taking it, the law directing the proceeding must provide for some kind of notice, and offer to the owner an opportunity to be heard, or the proceedings will want the essential ingredients of due process of law."

The discussion of the question by Justice Field begins on page 748 and ends on page 753; and by Judge Sawyer, it begins on page 762 and ends on page 766. This decision is decisive of the question under consideration.

Assuming that the county commissioners had the power to levy the assessment in proportion to special benefits (which we do not concede at all), the fact that the statute made no provision for a notice and hearing of that question, makes it clear that the property owners were deprived of due process of law. Therefore, the finding, the conclusion, of the commissioners on that subject was not binding upon, and conclusive against, these appellants.

Another consideration is pertinent. As was stated by Judge Philips in Fay vs. Springfield, supra, there are three questions which have to be decided when an assessment is made in proportion to benefits.

(1) Were the lot owners benefited at all by the improvement?

(2) If there were general and special benefits derived from the improvement, what was the value of the general benefits, and what was the value of the special benefits?

(3) Were the special benefits to the property owners equal or unequal, and if unequal, how much was the relative amount of each?

The statute under consideration makes absolutely no provision for such determination.

III.

THE DECISION IN NORWOOD vs. BAKER, 172 U. S., 269, APPLIES.

The next question is, Do the principles of the decision in Norwood vs. Baker apply to, and rule, this case? There was no property of the complainants' appropriated in a condemnation proceeding, and the cost of it assessed back on this land. There was, however, land of Frederick Miller and E. Bennignus, other abutting property owners, appropriated, and the compensation and damages awarded to them, amounting to $1850, were assessed as a part of the cost of the improvement. Opposite counsel may contend that there is no proof of this statement. But the answer admits that $1250 was allowed to Miller and $600 to E. Bennignus, for their land; the evidence proves this (see pages 90 and 91 of the Record); *and inasmuch as the statute (Sec. 6) commanded the commissioners to assess such claims, as part of the cost of the improvement upon the abutting property, we have a right, in the absence of contrary evidence, to infer that it was done.*

However, for the purpose of this argument, we are going to concede that the difference between this and the Norwood-Baker case, is that there is, as to the appellants, no condemnation feature in this case. But, upon principle and reason, that should make no difference in the decision of the case. If the law is a system of reasons, if it is composed of legal principles, if the adjudications of the courts are only witnesses of what

the laws are, the fact, that the facts of this case are not exactly like those in the Norwood-Baker case, is a matter of supreme indifference.

In that very case this court, itself, by clear implication, refutes the notion that its decision was only intended for a precedent in a case where property was condemned and its cost assessed back upon the property. The opinion of Justice Harlan states that the views of the court are supported by other adjudged cases, as well as by reason and principle, and he cites them, the court thereby approving them. They are:

> Agens vs. Mayor, Etc., 37 N. J. L., 416;
> Bogert vs. City of Elizabeth, 27 N. J. Eq., 568;
> Hammett vs. Philadelphia, 65 Pa. St., 146;
> Barns vs. Dyer, 56 Vermont, 469.

In not one of these cases was there any condemnation feature. In the first one the assessment was for the cost of repairing an old road bed; in the second, for the cost of a wooden pavement made on an old road bed; in the Pennsylvania case, for an improvement made on an old and established road; in the Vermont case, for the cost of a sidewalk built on an old street.

In the dissenting opinion, in the Norwood vs. Baker case, Justice Brewer declared that the rule which the majority announced would apply to an assessment for grading, macadamizing or paving a street, as well as to one for the cost of opening or laying out a new street.

In Fay vs. Springfield, 94 Fed. Rep., 409, the assessment was laid, by the foot front rule, to pay the cost of repaving an established and old street; and Judge Philips said:

> "I am unable to perceive why this case is not controlled by the rule of the Supreme Court in Village of Norwood vs. Baker, 172 U. S., 269."

If authority can establish the truth of a proposition, certainly we have assembled enough authorities to demonstrate that the

rules and principles of the Norwood-Baker case, should rule this case. But it seems to us, after all, that authority was not necessary to justify the application of the decision in Norwood vs. Baker to this case at bar.

The case is a precedent for every proposition that was either consciously or unconsciously in the mind of the court. The doctrine of the case is its essence; it is a precedent for its doctrine. The doctrine of a case is a general proposition of law from which the decision, under the illumination of the facts of the case, flows. The doctrine of the case is the basis of the decision. The doctrine of the case is not the language of the judge who wrote the opinion; it is the principle of the case. A conclusion is often a necessary inference of the decision, but necessarily assumed and implied in the course of the decision. The authority of such a decision in establishing a rule, especially when the decisions are numerous and carefully considered, is often as weighty as that of a direct affirmative assertion.

Live Stock, Etc., Ass'n., vs. Crescent City, Etc., Co., 1 Abb. N. S., 338.

Applying these well known criteria, it is self-evident that the decision in Norwood vs. Baker should not be limited to cases in which the property was condemned and the compensation and damages awarded for the land was assessed back upon the property.

IV.

THERE HAS BEEN NO REVERSAL OF THIS CASE.

So far as this case at bar is concerned, the decision in Norwood vs. Baker, supra, has not been reversed by the decisions of this court in French vs. Barber Asphalt Paving Co., 181 U. S., 324, and in eight other cases decided at the same time.

In French vs. Barber Asphalt Paving Co., supra, Justice Shiras, in discussing the "legal import" of the decision in Norwood vs. Baker, said:

> "It may be conceded that courts of equity are always open to afford a remedy, where there is an attempt, under the guise of legal proceedings, to deprive a person of his life, liberty or property, without due process of law. And such, in the opinion of a majority of the judges of this court, was the nature and effect of the proceedings in the case of Norwood vs. Baker."

Again, in Town of Tonawanda vs. Lyon, 181 U. S., 389, the same justice said:

> "The case of Norwood vs. Baker, presented, as the judge in the court in the present case well said, 'considerations of peculiar and extraordinary hardships,' amounting in the opinion of a majority of the judges of this court, *to actual confiscation of private property to public use, and bringing the case fairly within the reach of the Fourteenth Amendment.*"

(a) It is undisputed, in the case at bar, that strips of land were taken for the purpose of widening the street from the lands of Miller and Bennignus; that one of them was allowed $1250, and the other $600, and the record shows that the strip of land belonging to each of them was, "appropriated for the widening of the said street." (Page 91 of the record.)

These two sums of money were added to the cost of the improvement, and assessed back upon *all* the lands of the abutting property owners, including appellants.

(b) In the French-Barber case, one of the reasons assigned by the Supreme Court of Missouri, and adopted by the Supreme Court of the United States, for the conclusion was, that "all of the lots are substantially on the grade of the street as improved, and *are similarly situated with respect to the asphalt pavement. * * * There is no showing that there is any difference in the value of any of the lots abutting upon the improvement.*"

This was not the condition of the abutting lands that were assessed to pay for the improvement in the case at bar. The undisputed testimony shows that the land of the appellants was damaged by the improvement of the road or street. In order to elevate the land to a level with the grade of the road, they expended $5000 for dirt. This is testified to by Dr. Shepard (pages 61 and 62 of the record), and not disputed.

On page 38 of the record another witness testified that, nearly along the whole front of appellants' property, the street was raised above their property, "10 or 12 or 14 feet," and that they (appellants) "put in nearly 70,000 yards of dirt there at an expense of nearly $5000.00, if not quite." By the same witness it was proved that the street was elevated, before the improvement, above their land, and that the previous elevation and the elevation caused by the improvement aggregated "probably 18" feet.

On page 40 and 41 of the record will be found the answers of this witness to questions as to the difference in value between the property of the appellants and other abutting property. He said that the property of the appellants was "worth less per foot than the property east of it."

Another witness testified that the property belonging to the Bullitt Syndicate, or Columbus Land Association, (interchangeable names), having a frontage of about 2500 feet, and being about one-half of the whole frontage along the improved road, and lying east of the land of the appellants, "got all the benefit, or nearly so, in that—nearly all the benefit—all the special benefit; that is, by the change of grade," caused by the improvement of the street. (Record 22.)

The appellee not only did not dispute the testimony of the appellants, showing that there was a difference between the value of the property of the appellants and other abutting property along the improvement, but his evidence corrobo-

rates that of the appellants. One of his witnesses testified that he "would not have paid the same price for it" (the property of the appellants) as he did for his own, which was situated farther east; because he said "it was lower and there was too deep a grade made there." He further testified that his own property, which was a lot one hundred feet wide, was so situated, after the improvement was made, that it was "nice terrace property," and that it "would not be necessary to lower it any," for residence purposes; and further that the "average" of at least half the frontage along the improvement, beginning at the east end, was "in a desirable shape." That is to say, the land of the appellants was not as valuable as his own, and therefore that the average of all the lands along the east end was more valuable than the land of the appellants. The land of the appellants was situated on the extreme west end of the improvement. (Page 97 of the record.)

Another witness of the appellee testified that "the property east * * * is more valuable because it is higher." (Record 105.)

(c) The highest value that was put upon the property of the appellants by anybody, and he was not a witness in the case (Keyes or McCalla), was $1500 per acre. (Page 30 of the record.)

Morrison testified that it was worth, before the improvement, $1000 per acre; and that it was worth only $1200 an acre after the improvement was made. (Page 21 of the record.)

Denmead testified that the land of the appellants, which was assessed, was worth, before the improvement was made, "about $700 an acre"; and that it was not worth any more after the improvement was made. (Page 50 of the record.)

Charles McLeish testified that the same land, before the improvement was made, was worth $700 or $800 per acre, and that the improvement did not enhance its value more than $100 per acre. (Page 37 of the record.)

Another witness, Orebaugh, testified that the land, before the improvement, was worth $30 a foot, which, by calculation, would not make it exceed $600 per acre; and that the improvement only enhanced its value to $60 per foot, and, further, that if the appellants' land was assessed to an amount over $12,000, and if they had paid over $8000 of it, they had paid for all the special benefits from the improvement. (Pages 59 and 60 of the record.)

Another witness, Tallmadge, testified that the land was worth, before the improvement, $500 an acre, and that the improvement of the road did not add anything to its value. He did not explain fully, but it sufficiently appears from his testimony that the reason there was no increase in the value was because the appellants had to make such a large fill in order to offset the damage that had been done to the property by the elevation of the road above it. (Record 79.)

We submit that the overwhelming preponderance of the evidence shows that the property of the appellants was assessed far in excess of the special benefits derived by it from the improvement of the road; that the abutting property along the east end of the improvement was of more value than the land of the appellants; that there was so much difference in value between them that a uniform assessment was unequal and unjust; that an apportionment of the assessment among the different abutting properties, in proportion to the relative special benefits, derived by them from the improvement, would have required a larger assessment upon the property at the east end of the improvement than the property at the west end, including that of the appellants.

The admitted and proved facts make it obvious that apellants were deprived of their property without due process of law.

The evidence proves more than this. It proves that the assessment levied upon the property of the appellants exceeded the actual value of the property.

(d) It is not disputed by anybody that the land of the appellants which was assessed did not exceed 6½ acres. (Page 38 of the record.) It is not disputed, but it is admitted by the answer of the appellee, as well as proved by the evidence of the assessing officer (page 85 of the record), that the assessment per foot front, which was levied, amounted to $11.25 per foot front. It is not disputed, but admitted, that the amount assessed upon the property of the appellants was $12,586.07. (Pages 4 and 10 of the record.)

The answer admitted that the assessment was $11.2476 per foot front, only a fraction less than $11.25, and did not deny the aggregate amount of the assessment as stated in the bill, upon the property of the appellants, and therefore, it is admitted. The admitted frontage of appellants was 1119 feet, and a calculation makes the number of acres stated. The aggregate assessment of $12,586.07 divided by 6½ acres, would make the assessment reach the rate of $1936.62 per acre. This is a mathematical demonstration that the assessment per acre exceeded the actual value of the land, after the improvement was finished, by nearly $500, the land being worth at the time $1500 per acre, as was proved.

It is a mathematical demonstration that the property of the appellants will be confiscated to pay their proportion of the expense and cost of the improvement. After deducting from the actual market value of the land the amount of the assessment, there was not only nothing left to the appellants, but it will compel them to pay nearly $500 per acre more

than the value of the land, unless this court grants their prayer for relief; that is to say, relief from the payment of the balance of the assessment.

It is not disputed, but admitted, that the appellants have paid on the assessment $11,981.22 and that there is yet due on the assessment $4002.34. (Pages 4, 13 and 84 of record.) They have paid more than the value of the land, and more than the special benefits derived by the land from the improvement, and they ask to be relieved from the payment of the balance.

The proper method of proving the lack of benefits was adopted, and that was by proving that the market value of the property was not enhanced by the improvement. This was the only way to do it.

Chicago Union Traction Co. vs. City of Chicago, 68 N. E. Rep., 519.

These facts, which we have just enumerated, and which are proved by a decided preponderance of the evidence, clearly bring the case at bar within the ruling in Norwood vs. Baker, supra, and within the ruling in French vs. Barber Asphalt Paving Co., and Tonawanda vs. Lyon, supra, which we have illustrated by selections from Justice Shiras' opinion.

V.

ESTOPPEL.

The only real defense in this case is estoppel, and it has only a plausible basis.

We insist that there is no merit in the defense of estoppel. The acts, the conduct, of the appellants, which are sought to be made estoppel, lack the essential elements of estoppel. We do not intentionally and consciously look at these acts with the bias of a partisan. We have tried to take

a colorless view of them, and we are not willing to admit that a single one of them conforms to the established definitions of estoppel.

The decisions in State, ex rel., vs. Mitchell, 31 Ohio St., 592, and in Tone vs. Columbus, 39 Ohio St., 281, and other Supreme Court decisions of the state which have simply followed those decisions, have been enlisted to give countenance to the most extravagant claims of estoppel. "Active promotion" of an improvement, terms used in these cases, are so general and vague that almost any claim of estoppel may use them as a sanctuary. The complexion, the color, of those two cases, given to them by their peculiar circumstances, is often overlooked in considering them as precedents for estoppel. The board of improvement, in those two cases, was elected by the property owners themselves. The board was required, and had the power, to prescribe the kind of materials used in the improvement, the kind of pavement made, how the work should be done; it devised the plans; it superintended the work; it made the contract with the contractor; and it levied the assessments. The city was almost a stranger to the undertaking. The improvement was initiated, carried on, and completed by the property owners themselves. It is no source of wonder that the Supreme Court concluded that the city should not pay the assessment levied upon the property of the commissioners of the board of improvement and others who had "actively promoted" the improvement by voting for the commissioners of the board and by petitioning for the improvement. But it is a misnomer to call their acts estoppel. They were contractual acts. They made a contract for themselves with the contractor to construct the improvement, and, instead of styling it an estoppel, it should have been designated a contract voluntarily entered into with the contractor, and therefore, that they

should perform their own contract, and not ask the city to fulfill it for them.

But no matter what may be construed to be estoppel in the State Supreme Court, we assume that this court will follow Federal decisions, which may conflict with the decisions of the State Supreme Court on this subject.

In two cases, at least, this court has decided that to make the principles of estoppel available, either fraud, or its equivalent, culpable negligence, must be proved. We refer to the cases of Leathers M'frs. Bnk vs. Morgan, 117 U. S., 108; and Henshaw vs. Bissel, 18 Wall., 271.

In Lyon vs. Town of Tonawanda, 98 Fed. Rep., 361, (which was reversed, but not on the point for whose support it is cited now), Judge Coxe defines estoppel which may defeat an attack made upon an assessment in a case just like this. *The party who rests his defense upon estoppel must show that by having relied upon the other party's conduct, he has placed himself in such a situation that he would suffer a loss as the consequence of his action, if the other party were permitted to disown his conduct or its effects. The conduct claimed to be estoppel must have either benefited the one party or injured the other party.* The party making the defense of estoppel must have been induced by the conduct of the other to believe and act upon it, to his prejudice.

Estoppel is not a favorite of courts of equity. But we will quote Judge Coxe's own language:

> "Fourth. The essential elements of an estoppel are lacking, there being nothing to show that the defendants relied upon the company's acts or were misled thereby. There is nothing to show that the petition and consent induced the improvement. For aught that appears to the contrary, the pavement would have been laid precisely as it was laid if the Columbia Company had never existed. *No injury to the defendants or benefit to the complainants followed from these acts.* * * *

> Equity recognizes and tolerates estoppels, but it does not encourage them. She admits them into her domains, but they are usually regarded as undesirable aliens, having little in common with the other members of her family. Before saying to the suitor that his rights have been destroyed by his own acts, a court of equity should be certain of the rectitude of its position."

The decision in O'Brien vs. Wheelock, 95 Fed. Rep., 883, is another case upon which we shall largely rely; in fact, in the appropriate place, we shall endeavor to show that the decision there is decisive of the question of estoppel in this case.

We simply ask for an application of the principles enunciated in these Federal cases to the so-called acts of estoppel relied upon by the appellee in this case.

(a) Was there any fraud in the conduct of these appellants, or either of them?

(b) Did any of the acts of the appellants benefit themselves or injure the county commissioners for the county?

(c) Did the county commissioners rely and act upon any of the acts of the appellants, or either of them, to their prejudice?

(1) These appellants signed the petition for the improvement. Even in our own Supreme Court this act is no longer regarded as foreclosing a property owner's right to impugn an illegal assessment. In the face of the decision rendered by our Supreme Court in Birdseye et al. vs. Village of Clyde, 61 O. S., 27, it would be vain for the appellee here to contend that the signing of the petition by these appellants was an act of estoppel. We quote the applicable part of the syllabus:

> "The owner is not estopped to maintain such an action" (that is, an action just like this to invalidate the assessment) "by having acquiesced in the construction of the improvement, nor by petitioning therefor, and thereby consenting to the raising of a certain proportion of the

cost by assessment on all abutting property. By such act he binds his property for its proper share of a *legal assessment* for the cost of the improvement, *but no further.*"

In at least two respects that case is identical with this.

(a) The council of the village did not initiate the improvement; before it could act, a certain number of owners of property frontage had to petition for the improvement. Here, in the case at bar, the improvement proceeding could not be commenced, and was not commenced, until a petition by the owners of one-half of the feet frontage was presented to the commissioners. But the Supreme Court, in that case, did not deem the fact that the property owners initiated the improvement, as militating against their right to have relief against any illegal assessment.

(b) In that case bonds were issued to pay for the cost of the improvement, presumably upon the faith which the village council had in the efficacy of the petition. In this case bonds were issued upon the faith of the county commissioners in the petition and other acts of the complainants. Yet, in that case, the Supreme Court did not give any weight to that fact against the property owners. The printed report of that case does not disclose the fact that bonds were issued, but, if opposite counsel challenge our statement, we will furnish the court a copy of the pamphlet record which does show it.

Judge Coxe's opinion, in 98 Fed. Rep., 369, is in accord with the opinion of our own Supreme Court on this question, and its quotation is appropos:

"Second. *A petition for an improvement is not a petition for an illegal assessment.* In all the company's acts" (the company was the property owner and plaintiff), "there is nothing inconsistent with the theory *that it supposed the expense of the improvement would be lawfully and justly apportioned. It did not assent to extortion or to confiscation, or to the taking of its property for public use without compensation.*"

A quotation from the opinion of Judge Williams in the Birdseye case is also appropriate to this part of the discussion:

> "A further claim is made, in support of the judgment below, that the plaintiffs are estopped from contesting the assessment against their property, because, with knowledge that the improvement was under construction, they suffered it to proceed to completion without objection, but, if all of the plaintiffs are not so estopped, those of them are estopped who signed the petition that was presented to the council requesting the improvement to be made. * * * This acquiescence on their part would be sufficient to estop them from *attacking the validity of those proceedings.* But they had no knowledge of the amount of the assessment charged against their lots, and could have none, until the assessing ordinance was passed, and they promptly interposed with their injunction as soon as they learned the assessment exceeded twenty-five per cent. of the taxable value of their lots. Silence *or assent to the making of the improvement*, could not operate as an estoppel to challenge the correctness of the assessment; for, until the plaintiffs had knowledge of the assessment, it was their right to assume that it would be made in conformity with the law, and not in violation of the positive prohibitive provisions of the statute. To hold otherwise would require them not only to take notice at their peril of the illegal action of the public authorities, but to anticipate that in every official action they would disregard their legal duties. Their silence or acquiescence bound them no further than to submission to the proper assessment against their property legally imposed, *and it can hardly be supposed that the plaintiffs who signed the petition for the improvement intended thereby to donate their entire property to the public, or what is practically the same thing, consent to an assessment that would amount to its confiscation.* They evidently contemplated that some special benefit would accrue to them from the construction of the improvement, *which possibly could not be the case if the substantial value of their property were taken to pay the assessment laid upon it.*"

Till they knew what the assessment was, and how it was levied, the appellants here in the case now being argued, had a right to assume that it would be made in obedience to the

organic, as well as the statutory law; they had a right to assume that it would not be levied in violation of the positive prohibitions of the constitutions of the United States and the state; that is to say, the provisions which forbade an assessment, not based on the consideration of special benefits, and which forbade an assessment in excess of special benefits, and the taking of property for public use without compensation.

A broad principle is announced in the syllabus of Birdseye vs. Clyde. It is comprehensive enough to warrant the contention that no act of the property owner, done before the assessment is levied, even though it had promoted the improvement, should estop him from attacking the assessment, because it is illegal, *or because it confiscates his property, or takes it for public use without compensation.* If the assessment here was illegal, as it surely was, under the application of the decision in Norwood vs. Baker, then none of the acts of estoppel relied upon here have any merit as estoppel against the assessment. *Such acts do foreclose the property owner's right to attack the validity of the improvement, but not to assail the assessment.* This distinction is made conspicuous in Birdseye vs. Clyde.

We ask Your Honors to note the terms of the petition in Birdseye vs. Clyde. In express terms it prayed for an assessment to be levied upon the property of the petitioners—an assessment which was illegal, which exceeded the limit fixed by statute. Yet the Supreme Court declared this was no estoppel where the assessment is assailed.

And we ask the court to observe that in Lyon vs. Town of Tonawanda, supra, the complainant not only petitioned for the improvement, but it "ratified and confirmed the action of the town in making it." So the record says. (Pages 363, 98, Fed. Rep.) Yet that was not permitted to estop the plaintiff from impugning the assessment.

(2) These appellants, as the Alum Creek Ice Company, signed the agreement in regard to the circle. It is in the transcript of the evidence on page 71 of the record.

We insist that it was error to consider this agreement. The original was not offered in evidence; nor was its loss of destruction proved. Placing it on record in the commissioner's office did not dispense with its primary evidence.

Assuming that it was signed, though it is doubtful from the testimony of Dr. Sheperd, (page 74 of the record), a brief analysis of this agreement, and a consideration of the facts which inspired it, are necessary to an intelligent comprehension of its meaning. The internal evidence of the agreement itself shows very plainly that the property owners objected to a continuation of the improvement, because they apprehended that the cost of removing the dirt from the circle, and the cost of beautifying and adorning it were to be assessed upon the property owners; thereupon, the Columbus Land Association, which owned most of the land along the improvement, proposed and agreed, by the first part of the paper in evidence, that it would pay these two items of cost, if the improvement was permitted to go on. To this the property owners assented, and they signed this paper (page 71 of record) a paper by which they agreed to withdraw all objections to the improvement, and "an assessment of their property." But it would be both illogical and illegal to construe that into an agreement that their property should be illegally assessed, or confiscated, as it practically was. They said, by this paper, that they withdrew all objections to an assessment of their property. But that is no more intense in its meaning than their petition for the improvement was; for the petition prayed that their property should be assessed, just as the plaintiffs did in Birdseye vs. Clyde, supra, and as the plaintiffs did in the Tonawanda case. This

agreement was nothing more than a reiteration of the prayer of their original petition. Why, then, should it have any different effect?

The cost of constructing the circle was not, as the court can readily observe, involved in this transaction. Not a dollar was added to the cost of the improvement, in whole or in part, by the execution of this agreement, nor by any action taken under it by the commissioners. Hence the county was not injured by it, and the act of executing the paper lacks an essential element of estoppel.

It can be easily perceived that the cost of an improvement of a street or road, with a circle in it, would be much greater than a street without a circle; but not a word is said in this agreement about that additional cost. If this additional cost was not originally estimated, as we admit, then, by a freedom of construction which is exceedingly questionable, this agreement might be construed as a recognition of the circle. We will argue this view later in the brief.

(3) Some of the original complainants, not all of them, signed a petition asking the county commissioners to alter the contract with the contractor so as to release him from sodding the sides of the improved roadways. (Page 72 of record.) Their object was to enable the property owners to sow grass seed where the sod was to be put on. It is obvious that this did not increase, but, on the contrary, diminished, the cost of the improvement. The county was not, therefore, injured by the act of the complainants or the action taken under its influence. Their act was not promotive of the improvement.

(4) The Alum Creek Ice Company, by McLeish, signed a petition asking for the construction of sewers. (Page 73 of record.) But this cannot be construed as having any of the lineaments of estoppel, because the uncontradicted and

undisputed testimony of Walter Braun (page 85 of the record) proved that this was not done until the next year after the improvement of the road was completed. His testimony further proved that the cost of the sewers was not embraced in the assessment which these complainants are, in this suit, challenging. Braun was the officer who had charge, supervision, of the improvement of the road and the sewers, and who made out the assessment sheet. This makes his testimony most trustworthy. The cost of the sewers not being embraced in the assessment here assailed, and the sewers not having been constructed until the next year after the assessment was levied, the act of these appellants in signing the petition, asking for the construction of the sewers, cannot, by any straining of law or the imagination, be deemed an estoppel.

(5) Dr. Sheperd was a member of the board of improvement provided for by the 13th section of the act. The court will observe that, by the act, this board had no other function to perform than to appoint a superintendent. The board was not vested with any power to superintend or direct the improvement, or the contractor or the superintendent. The statute is not ambiguous on this subject. Besides the testimony of Dr. Sheperd proves that neither the board to which he belonged, nor he as a part of it, exercised any control over the improvement or gave any directions about it to either the superintendent or the contractor. This board never had a meeting, except to appoint the superintendent. (Page 82 of the record.)

Before the board, of which Dr. Sheperd was a member, was appointed, the county commissioners had directed the improvement of the road to be made. The improvement would have gone on if Dr. Sheperd had not served upon that board; the board could not have stopped the improvement.

His service on the board was not "active promotion" of the improvement, in the sense in which this term is used in the Tone and Mitchell cases. There the plaintiffs who served on the board of commissioners, actively participated in the improvement by prescribing the plan and specifications for the improvement, by advertising for bids, by making the contract with the contractor, by superintending the work and by levying the assessment. That sort of conduct is what the Supreme Court characterized as "active promotion" of the work. It is true that signing the petition was also designated in those cases by the same term; but the decision in Birdseye vs. Clyde, supra, cannot be reconciled with those cases, on this topic, except by regarding it as having modified the others.

In Columbus vs. Slyh, 44 O. S., 484, the court said:

"We perceive no essential difference between petitioning for the improvement and participating in the election of commissioners." (Page 484). Hence, if, as the same court decided in the Clyde case, signing such a petition does not estop the petitioner from assisting the assessment how can Dr. Sheperd's participation in the election of commissioners, as he did by being elected, estop him from attaching the assessment here?

If the expense of a superintendent was estimated in the cost of the improvement, by which the county commissioners arrived at the conclusion that the rate of assessment should be $7.25 per foot front, the appointment of the superintendent by the board of which Dr. Sheperd was a member, did not add a dollar to the cost of the improvement. *If this is true, the county was not injured by this alleged act of estoppel.* It did not mislead the commissioners thereof into doing anything that made the county suffer a loss.

The appellee did not offer a particle of testimony to show

that the cost of the superintendent was not included in the original estimate of the cost of the improvement, or that there was anything added to the cost of the improvement by the appointment of a superintendent.

To meet the view that the doctor's service on the board might be construed to be an estoppel, we offered the evidence which shows what the superintendent received for his services. (Page 88 of Record). It was $186. In the context of this brief we will argue its relevancy.

(6) Sheperd and McLeish, but not Carr, signed the petition asking the county commissioners to extend the time for the payment of the bonds from ten to twenty years.

It also appears in evidence, (page 75 of the record) that Sheperd, Mitchell and McLeish, as the board of improvement, adopted a resolution of similar purport. As a board they had no power to adopt such a resolution. How McLeish came to sign, as a member of the board, there is no evidence to explain. He never was a member of the board; the record of the county commissioners, which is in evidence, shows that J. C. Lunn was the third member. There is absolutely no evidence that McLeish was ever a member of it.

But there was absolutely no estoppel in either of these acts, because the undisputed evidence is, that the county commissioners never acted upon the petition or resolution; the time for the payment of the bonds was not extended. (See Sheperd's evidence, page 75 of record.)

The county commissioners, not having acted upon either one, the petition or the resolution, those acts lack one of the essential elements of equitable estoppel. (2 Pom. Eq. Juris., Sec. 812.)

(7) The last paper which it is claimed the appellants, or either of them, signed, is styled a waiver. It is found in the record, on pages 75 and 76. An analysis of this document

cannot but be helpful. It has a preamble which recites that a petition for the improvement was signed and presented to the county commissioners. It describes the road to be improved; it states that the county commissioners acted upon the petition; it designates the act of the legislature under which this was done, and then, lastly, it recites that the petition and all the other original papers had been lost or mislaid. Then follows the agreement signed by the property owners. It states that in order that the bonds to be issued may not lie under suspicion, or remain unsold, *by reason of the loss of these papers*, they agree that they will not set up as a defense against the assessment for the payment of the bonds, *any informality arising from the absence or loss of any of said papers*, and that they *will not set up as a defense that the improvement was illegally made and constructed*. That is all there is in this paper.

These complainants have religiously lived up to this paper. They have not violated either one of the two stipulations in it.

(a) They are not interposing as a defense against the assessment any informality arising from the absence or loss of any papers.

(b) They are not interposing as a cause of action or as a defense against the assessment, that the *improvement was illegally made and constructed*. They make no attack on the legality of the improvement proceedings. *The cause of action is that the assessment was not legally made*. The agreement which they signed does not restrain or estop them from maintaining the action on this ground. In the very nature of things they could not have contemplated such a condition; *because, at that time, the assessment had not been levied*. They could not then know that the assessment would be obnoxious to any legal objection. This agreement of the appellants can not be tortured into meaning that they thereby consented that their

property might be illegally assessed, or confiscated, or taken for public use without compensation, and that if that was done, they would not resist it. It is not capable of any such construction. It is, therefore, perfectly innocuous, as evidence of estoppel against the complainants.

The testimony of Emil Kiesewetter (page 101 of Record), discloses that he was the agent of the bondholders who bought the first issue of $50,000 of the bonds, and that he relied upon this agreement. We objected to this testimony on the ground that the bondholders were not parties to this suit, and we filed a motion to suppress his testimony on this ground. (Page 109 of Record). It is probably immaterial whether it was sustained or overruled; because the evidence that the appellants have not violated either the letter or spirit of the agreement, is undisputed.

(8) Defendant makes a feeble claim that two of the original complainants, Sheperd and McLeish, but not Carr, signed still another paper, which he calls a waiver. It is found on pages 94 and 95 of the Record.

We objected to the testimony because the original was not offered or its loss or destruction shown. (Record, 96).

(1) We moved to strike this testimony from the case for several reasons. (Record, 107 and 108).

(a) The bondholders were not parties to this suit.

(b) There was no proof of the loss or destruction of the original of this paper.

(c) There was absolutely not a particle of evidence that the appellants, or either of them, even signed this paper or its original. During the oral argument below, Mr. Dyer for the appellee, frankly admitted that there was no direct proof of the execution of this paper by Sheperd or McLeish, or either of them; but an indefinite, half-hearted claim was made that, as the paper was found recorded in the records of the county

commissioners, that was proof of its execution by them. At that time we thought, and still think, it would be an abuse of the patience of the court to argue, at length, against such a baseless proposition.

In the answer of the appellee, it is alleged and charged that the appellants executed this document; by the replication this was traversed. The burden of proving its execution, therefore, rested upon the appellee. Now, the appellee, in effect, says:

> "I have proved it, because I have put in evidence the record of the county commissioners which contains the copy of a paper purporting to be signed by the appellants and others."

The statement of the proposition is a refutation of itself. The stipulation (page 94 of the record) goes no further than an agreement that this paper "is a copy of the county commissioner's record." The record does not pretend to assert that this paper was signed by the property owners, nor does the stipulation admit that it was so signed.

The copy of the record is merely proof of what is in the commissioners record. It is no proof of, it has not the remotest tendency to prove, the genuineness or authenticity of the document copied into the record.

This so-called waiver is a private writing, and not a public document.

There is no positive statute which commands or even authorizes it to be spread upon the records of the county commissioners. Being a private writing, the rule of Primariness in evidence law required that the original should be produced, or its absence accounted for when its contents are sought to be put in evidence. Its contents can only be proved by the writing itself—the writing which was executed by the parties. Secondary evidence, such as copies and oral

recollections of the contents, is only admissible after proof of loss or destruction of the original has been produced.

This rule is inexorable, but it was not obeyed in this case.

Here is a much stronger case before the court. The appellants deny that they executed such a paper. The appellee therefore was required:

(1) To produce the writing that was executed by the appellants, and

(2) To prove its execution by them.

We have said there was no positive statute which either required or even authorized this paper to be put on the record of the county commissioners, but to meet the contention in another way, we are going to waive, for the time, this objection. Section 1021 of the Revised Statutes of Ohio makes the auditor secretary of the county commissioners, and requires him to "keep an accurate record of all their proceedings," and to "carefully preserve all documents, books, records, maps and papers, *required* to be deposited and kept in his office."

Section 850 of the same statutes provides that the "record book" "shall be received as evidence in every court in the state." Assume that this paper was one of those "documents" or "papers," which the auditor was required to "carefully preserve," and we are willing to assume that receiving the paper and acting upon it by the commissioners, was part of their "proceedings," of which the auditor had to "keep an accurate record."

But all this does not prove that the complainants executed the paper. Adopting the most liberal view, the copy of the record only proves three facts:

(1) That such a paper purporting to be signed by the persons whose names are attached to it was presented to the county commissioners;

(2) That they acted upon the paper;

(3) That they had it spread upon their records.

But all this falls short of proof of the execution of it by the appellants.

The statute of Ohio authorizes deeds and mortgages to be recorded. A mortgage purporting to be executed by A to B was brought by B to the recorder and was by this officer recorded. B brings a foreclosure suit. A, in his answer, denies that he executed the mortgage. B offers, on this issue, a certified copy of the mortgage and of its recordation, and then rests. Would any court decide that he had proved the execution of the mortgage by A?

This identical question in reference to the record of a deed as evidence was decided by the Supreme Court of Ohio in Walsh vs. Barron, 24 Ohio St., 28. The third paragraph of the syllabus embodies the decision. To prove the execution of a deed the defendants in error, in the lower court, offered the "record of the deed," and the argument was exactly like Mr. Dyer's oral argument below in this case was, namely, that the record was admissible without proof of the instrument recorded. On this Judge McElvaine observed:

> *"The signature of the president of the corporation to such a deed does not prove itself. * * * It was error, therefore, to admit the deed without proof of its execution by the president of the corporation.*
>
> "It is suggested by defendants in error that, in fact, the record of the deed from the office of the recorder of Hamilton county was the instrument offered, and not the deed; and that the record was admissible without proof of the execution of the instrument recorded. To this suggestion it is sufficient to say, that the bill of exceptions shows that the deed itself was the objectionable instrument admitted, and we are not at liberty to question the verity of the record."

One of the questions passed upon by the court in that case was not only parallel to the one now being discussed; it was identical with it.

(9) For the purpose of presenting every possible view of the document and waiver, discussed in the last paragraph, we are going to assume, but not admit, that it is genuine. During the oral argument below it was stated, by opposite counsel, that the second issue of bonds, for $60,000, was not made until after the improvement was finished. The bill alleges that it was made August 1, 1891, and the answer admits this by not denying it; but we are willing to accept the statement of counsel as to when the bonds were really issued to the bondholders. At that time the work had been finished; the contractor had performed all the conditions of his contract; the county commissioners, or the county, were liable to him for his contract price; there was nothing these appellants could do that would change this legal-relation between the contractor and the county commissioners.

The execution of this paper did not induce or constrain the commissioners to add one dollar to the cost of the improvement. That cost had already been incurred and was irrevocably fixed.

If such a paper had not been signed by the property owners, the county commissioners would not have been released from their obligation to the contractor. The signing of this paper and its presentation to the county commissioners did not put them in any better situation. They would have been obliged to either issue bonds to pay the contract price, or order it paid from the general fund of the county. If this paper had never been executed or heard of, if it had not been executed, the commissioners could not have used any means, they could not have taken any action, to retrieve their position and save themselves from issuing the bonds, or paying the contractor out of the general fund. There were no such means accessible, and no such action "lay in their power."

If this alleged estoppel were not enforced against the ap-

pellants, the action of the county commissioners in issuing the $60,000 of bonds would not change their legal position for the worse.

From this analysis of the paper, therefore, it is clear that there is lacking an essential element of estoppel. (2 Pom. Eq. Juris., Sec. 812.)

Again, no bondholder, or his agent, testified that he acted upon this paper in taking this issue of bonds.

Not a syllable of evidence on this subject is in the record. There is not a syllable of testimony that these appellants, or either of them, made any representation to the contractor upon which he relied and acted.

There is not a single syllable of testimony tending to prove that these complainants, or either of them, made any representations or assurances to any person which induced that person to purchase the issue of $60,000 of bonds, or any part of said bonds.

From this standpoint, therefore, this case may be assimilated to the case of O'Brien vs. Wheelock, supra.

(10) We have already stated in this brief that we should largely rely upon the decision in O'Brien vs. Wheelock, 95 Fed. Rep., 883.

It is not in harmony with the decisions in the Mitchell and Tone cases; but so far as it conflicts with them we assume that this court will follow its leadings, instead of the state decisions. This case was decided by Justice Harlan and Judge Woods. In its facts, it is a close relation to the case at bar.

The statute of Illinois authorized the construction and protection of drains, ditches, levees, and other works. Upon the filing of a petition signed by the owners or occupants of the land, stating certain required facts, the county court, after determining that a drain, ditch, or levee, was necessary,

was authorized to appoint three commissioners for the improvement; the commissioners were required to examine the land sought to be drained or protected, and to determine given questions, one being whether the expense would equal the benefits. A jury had to assess the damages and benefits. It was the duty of the commissioners to survey, lay out, construct, repair, alter, clean, protect and maintain the drain, ditch, or levee. They were authorized to borrow money, not exceeding the assessment, to pay the cost, and to secure the same by notes or bonds; and it was their function to collect the assessment levied upon the lands to pay the cost. In three counties, Adams, Pike and Calhoun, drains, ditches and a levee were constructed, under this statute. Wheelock and Jones, two of the defendants in the case from which we quote, were two of the commissioners. They were also land owners. They caused the drains, ditches, and levee to be constructed. Bonds were sold and an assessment was levied by them. The Supreme Court of the State of Illinois adjudged the statute unconstitutional. Subsequently the constitution was so changed and amended that such a statute would be valid. Again, the legislature labored, and brought forth another statute, almost exactly like the other one, except that it provided for the formation of drainage districts. A drainage district was formed under the statute, which included the drains, ditches and levee constructed under the other statute, and to the county court, the commissioners, under the first statute, surrendered the levee.

In the meantime a suit was instituted by one Palms, a bondholder, for himself and other bondholders, in the United States Circuit Court. In his bill the history of the legislation and of the levee was given; it was alleged that the money arising from the bonds was used in constructing the levee; that the bonds were unpaid; that the land owners and

commissioners still keep and use the works, the levee, to protect their lands; that they refused to pay and collect the assessments and apply them to the payment of the bonds; that the land owners knew, at the time, that they were enjoying the use of the levee, that the money arising from the sale of the bonds was used to build the levee; that the state courts refused to give effect to the statute authorizing the improvement. The prayer was for an accounting of money paid by the bondholders; of the manner of its application, and for the impressment of a lien upon the assessments to secure the amount due upon the works and upon the assessment, and for an order commanding the commissioners to collect the assessment and to pay them over to the bondholders, and also commanding them to take possession and control of the works.

The commissioners answered, averring the refusal of the land owners to pay the assessments; the bringing of suits in the state courts to test the validity of the statute; and the decision of the State Supreme Court adverse to the law.

The decree entered by the court is stated on pages 896 and 897 of the report. Among other things it decreed that the amount due the bondholders was a lien upon the assessments: *that the bondholders should have the liberty to prosecute, in the name of the commissioners, suits for the collection of the assessments.*

Afterwards, Palms died. Thereupon his executors brought the suit in the United States Court which Justice Harlan and Judge Woods decided, making the surviving commissioners and numerous land owners defendants. The contents of their bill is recited on pages 889, 900 and 901 of the report.

Several averments of the bill we emphasize for the purposes of this argument.

(a) That the defendants who had acquired their lands after the assessment was levied, did so with knowledge that the money of the bondholders had been used to pay for the levee; that with such knowledge they had used the levee for the protection of their lands.

(b) That certain of the defendants, including the commissioners, "participated in causing said bonds to be issued and sold and the proceeds expended by actively soliciting the passage of the act of 1871." (The statute declared unconstitutional by the State Supreme Court.)

(c) That the provisions of the statute were made known to the land owners. (Dr. Sheperd was closely questioned in this case about his knowledge of the Ohio suburban statute, pages 78 and 79 of record.)

(d) That certain other defendants "participated in causing said bonds to be issued and sold to plaintiff's testator, and the proceeds to be expended in the construction of the levee, and in causing the said assessments to be made by signing the petition to the Pike county court"; that certain land owners, defendants, "participated in procuring the bonds to be sold by signing * * * a petition for a *second assessment.*"

(e) That the defendants, through Charles M. Clark, procured the passage by the legislature of the (invalid statute) and *"devised a plan for the organization of a corporation composed of persons interested in the lands, for the purpose of raising money to put the act into effect; that a large part of the defendants subscribed to the capital stock of that corporation in order to effect the objects of its creation."*

(Was there ever a case of more "active promotion" of an improvement?)

The act of estoppel imputed to Dr. Sheperd in this case at bar, consisting of his service on the board that appointed the

superintendent, pales into insignificance when compared with the acts of estoppel set up in the bill in the case just quoted from, against the commissioners there.

The other alleged acts of estoppel charged to all of these complainants are not nearly as intense in meaning as some of those charged against the property owners in the case quoted from.

Under the decisions in the Mitchell and Tone cases, supra, our state courts might have shut the door of equity in the faces of property owners who had done such acts as were done by the commissioners and land owners in the Illinois case.

But the United States Circuit Court of Appeals, composed, as we have stated, of Justice Harlan and Judge Woods, adopted a different view of the alleged estoppel conduct. The judgment of the Circuit Court, dismissing the bill of the bondholders, was affirmed; the reply of estoppel was smitten with a heavy hand. Justice Harlan's opinion of the estoppel issue is instructive. We quote some of it.

"But it is contended that, even if the act of 1871 be held to be unconstitutional, the plaintiffs are entitled to relief against all the defendants who have received a valuable consideration through the statute procured by their own consent, or subsequently sanctioned by them, and by which they derived an interest. Some authorities are cited which apparently support this view. But, when carefully examined, they do not, we think, apply to a case in which the circumstances are so peculiar as those disclosed by the present record. All who had any connection with the passage of the act of 1871, or who desired its passage, acted, as we may assume, in good faith, and in the firm belief that its provisions were not inconsistent with the constitution of the state. It cannot be said that anyone was guilty of fraud. *No assurances of any affirmative character were given by the land owners to those who constructed the*

work, or to those who, like Palms, purchased the bonds after they were executed and delivered to the contractors. The land owners, the contractors and the purchasers of bonds, all had equal opportunities of information, and one class was no more to be charged with knowledge of the law than another class. *It is a case of an honest mistake as to the competency of the legislature to do what it attempted to do, no one being misled by the assurances and representations of others.* The entire argument of learned counsel for the plaintiffs on this part of the case, leaves out of view, or assumes to be of no consequence whatever, the fact, apparent on the face of the act of 1871, that what the land owners, proceeding under it, had in view, was not simply to have a levee constructed, *but to have a sufficient levee, which could be repaired from time to time and permanently maintained under legal authority. In the very nature of things, it cannot be supposed that any land owner would have become connected with the scheme embodied in the act of* 1871, *unless the maintenance of the levee by competent legal authority was assured.* It is therefore unjust to the land owners, to say anything more than that they assented to the construction of the levee. If they are deemed to have assented to anything, it must be further said that they assented to the scheme under which the levee was to be construct d *and maintained*, under the authority of law, from time to time, and so as to accomplish the results contemplated by the legislature. The system devised by the act of 1871 is to be looked at in its entirety. We cannot put out of view any vital part of it, and hold the land owners who acted in good faith, *and who gave no personal assurances, and made no representations*, responsible for the results to others flowing from invalid legislation and the partial execution of the original plan. If it be said that the plaintiff's testator would never have purchased the bonds except in the belief that the act of 1871 was valid, with equal

truth it may be said that the land owners never sought or desired such legislation, except in the belief that the levee would be maintained by the same authority that constructed it." (Pages 906 and 907 of the report).

The observations of Justice Harlan touching the motive, the impulse of the land owners—that is, that they acted on the belief that the levee would be maintained—is strikingly applicable to the case at bar.

By the 16th section of the Ohio statute, provision was made for a board of control whose duty it was to keep the improved street or road in repair. The section in full is as follows:

> Section 16. On the completion of the improvement of any road or street under the provisions of this act, the commissioners shall appoint a board of control for said roadway, to consist of three of the property owners of the lands abutting upon said improvement, who shall serve without compensation, and have charge of the repairs and condition of said improved road. Said board shall be appointed to serve two years, or until their successors are duly appointed and qualified. Said commissioners shall fill any vacancy that may occur in said board by an appointment for such unexpired term. Said board shall see that said improved roadway is kept clean and in good repair, and all expenses incurred by said board in such work shall be by them returned to the auditor of the county in a written report of said board, to wit: On the first Tuesday of January, of each year, together with an itemized statement of the expenses incurred by said board, which sum, if deemed correct and proper by said auditor, shall be by him assessed per foot front on all property abutting on said improvement; such assessment, until paid, shall be a lien, as other expenses of making said improved road."

In Bennignus vs. The County Treasurer of this county, a case involving the validity of the same assessment, (62 O. S., 666), the Supreme Court of Ohio adjudged that this statute was unconstitutional, just as the Illinois Supreme Court declared the statute of that state void. The reason assigned was

that it violated Section 26 of Article 2 of the Ohio Constitution That renders the statute invalid for all purposes. Nothing whatever can be done under the act. A board of control to maintain and keep the road in repair cannot be appointed; till additional legislation is enacted, the road will be neglected and fall into decay.

The property owners, as well as the bondholders and the county commissioners, did not get what they contemplated. When these appellants gave their consent by signing the petition and other papers, they gave it upon a condition. The assent was not only given to the construction of the improvement; paraphrasing Justice Harlan, their assent was also given to a scheme under which an improved road was to be "constructed and maintained," under the authority of law, from time to time, and so as to accomplish the results contemplated by the legislature. By reason of the decision of the State Supreme Court this condition upon which they gave their consent has utterly failed.

We submit, and respectfully insist, that under the decision in O'Brien vs. Wheelock there is no merit in the defense of estoppel interposed in this case by the treasurer. Under both the letter and spirit of that case the defendant has ignominiously failed to make out a case of estoppel against these complainants.

It can not be differentiated from this case at bar because it was a suit by bondholders, as opposite counsel try to do. The bondholders were given permission to prosecute the suit in the name of the commissioners, and it was so prosecuted.

We now present another view of the estoppel issue. *The undisputed evidence shows that, before the contract was made and before the improvement was begun, the county commissioners estimated its cost, and that they ordered that its cost should be $7.25 per foot front.* The property owners had the

right to assume that this cost would be the limit of the assessment, unless it should be increased by their own conduct. We have proved, by the overwhelming weight of the evidence, that the assessment of $11.25 per foot front, which was levied, was largely in excess of the special benefits; in fact, one witness, Carr, who no longer has any interest in the issue of this suit, testified, without objection, that he would not accept the land as a gift, if the gift was made upon the condition that he should pay the balance of the assessment that is unpaid. (Record, 99). The defendant really examined only one witness on this issue—Mr. Heffner.

Tracy, the defendant's witness, testified that he bought a lot after the improvement had been completed, which was one hundred feet wide, for the price of $75.00 per foot front. Much reliance is placed upon this testimony by the defendant. Against this evidence we proved by Martin (page 24 of the evidence of complainants) that after the improvement was completed, one-half of the Stansberry lot sold for $1000 per acre, which was $6.35 per front foot. The Stansberry property had a frontage of 555 feet. (Page 33 of Record). So that, while one lot having a frontage of 100 feet sold for $75 per foot front, a lot having a frontage of 555 feet sold for $6.35 per foot front. That more than neutralizes the testimony offered by the defendant. If the sales made, after the improvement was finished, are to fix the value of the property, showing its increase in value, the preponderance is decidedly upon our side.

The undisputed testimony establishes that the appellants, in order to make their property conveniently accessible, after the road had been finished, had to spend, and did spend, over or about $2000 for dirt to make fillings. (Pages 38 and 62 of Record). This testimony makes this case again resemble the case of O'Brien vs. Wheelock, supra. The following quotation from the opinion will manifest the truth of this statement:

> "It is said that the defendants are in the actual enjoyment of the work done under the act of 1871, and therefore they are equitably bound to pay for it. In what sense are they in the enjoyment of such work? There was evidence tending to show—indeed, we think the weight of the evidence was—that the levee built under the act of 1871 was not adequately constructed. At any rate it broke in 1876 and left the land intended to be benefited in a condition almost as bad as when the act of 1871 was passed. Fences, improvements and houses were washed away, entailing large losses upon land owners."

So we ask in this case, in what sense were the appellants benefited by the improvement? The improvement left their property in such a condition that they had to make an expenditure of $5000 to enable them to use the road in connection with their property.

Some of the witnesses went so far as to say that the improvement was no special benefit at all to the land of the complainants. All of the witnesses to whom the answer was put agreed that the complainants had paid more than the value of the special benefits.

The constitutional limit to the assessment was the value of the special benefits to the land. That limitation has been established by both the United States Supreme Court (Norwood vs. Baker) and by our own Supreme Court. (Walsh vs. Barron, 61 O. S., 15).

After the commissioners entered into the contract with the contractor for the construction of the improvement, the property owners could not have had the improvement enjoined, no matter how much they might have been dissatisfied with, or wronged by it; because the contract rights of the contractor had intervened.

Now, we are going to assume, but not admit, that the complainants committed acts of estoppel which induced the county commissioners to add some costs to the original estimated cost of the improvement. By the wildest strain-

ing of the law and facts there were only two of those acts. One was the appointment of a superintendent by the board of improvement. The cost of this officer we have shown was only $186.00. (Page 88 of the record.)

The other act was the agreement concerning the circle. The additional cost of the circle, we have shown, was $8030. (Page 88 of record.) The whole frontage assessed was 9615 feet. (Page 87 of the record.) Distribute this additional cost along the frontage of 9615 feet, and it amounts to $.854 per foot front. That added to $7.25 per foot, makes an aggregate of $8.104-10. Appellants have paid of principal $8810.27, being $7.87 per foot front on their frontage. They have paid of interest $3170.95. This added to the principal would make $11,981.22. They have, therefore, paid in all, $10.70 per foot front.

Giving them credit for the interest paid, they have paid enough to more than equal the original cost of the improvement, and the added cost also; in truth, they have paid an excess of $2.60 per foot front. If they are not entitled to credit for the interest paid, then, they only owe $.231-10 per foot front, which would aggregate on their entire frontage $261.78. In no event ought they to be required to pay any more than this sum.

This view of the estoppel is fully sustained by the decision of the Circuit Court of Hamilton county, Ohio, in Storer vs. Cincinnati, 4 C. C., 278, which was afterwards affirmed by the Supreme Court, 24 W. Law Bulletin, 371.

Is there any reason why they should not be entitled to credit for the interest?

(1) If the assessment had not been an illegal one, in amount, they would not have been required to pay so much interest.

(2) If the principal of the assessment was excessive

originally, certainly they ought to be entitled to credit for the interest they paid on the excess above the limit of special benefits.

VI.

DEFENSE OF LACHES.

It may be argued that the appellants had been guilty of laches, in this, that they had delayed unreasonably in bringing their suit. They may allude to the facts that eight years had elapsed since the assessment was levied, and that the appellants had paid six installments of the assessment.

(a) The decisive answer to a defense of laches, that there has been an unreasonable delay in applying for a remedy to redress a wrong is ignorance of rights, *whether of fact or law.*

> *Brown* vs. *Sutton*, 129 U. S., 238;
> *Hammond* vs. *Hopkins*, 143 U. S., 224.

The testimony of all the appellants discloses that none of them knew about their legal rights, based on the fact that the assessment was illegal, and that the law was unconstitutional, until just a short time before this suit was brought.

(b) They were not obliged to sue until an effort was made to collect the assessment. This identical question was decided in Columbus against Agler, 44 O. S., 485. It is an unsyllabused case, but the pertinent part of the opinion is this:

> "She" (plaintiff) "was not called upon to do anything until steps were taken to make the assessment upon her property."

This question was again decided by the Supreme Court in Lewis vs. Taylor, 61 O. S., 471. There the court said that the plaintiff, who had not promoted the improvement, was not obliged to so sue till "an attempt is made to enforce the assessment." "He is not required," it was further said, "to

begin such suit at an earlier day, though he may know of the improvement and of the intention to make the assessment."

(c) The defendant has no right to complain of the delay, because it was no injury to him. The more delay there was, the more the installments of the assessment which were paid. The delay was a benefit, an advantage to the county. Laches is only a defense when the defendant was harmed by it. In Cincinnati vs. James, 55 O. S., 180, it was decided that the voluntary payment of six installments of an assessment was not a bar to a suit for injunction against the rest of them, if they were illegal.

VII.

It may be urged that this court should follow the decisions of the state courts. Certainly it is not necessary to combat this proposition so far as it relates to the question, whether the assessment was legal; that is to say, whether it was a violation of the Fourteenth Amendment to the Constitution of the United States.

Nor is there any more necessity for arguing it so far as it relates to the estoppel branch. The question of estoppel is not a question of local law. It is not a question about the construction of the state constitution, or a state statute. It is only on questions of this character that the United States courts are obliged to follow the decisions of the state courts.

The question of estoppel is one of general law, of general jurisprudence, and upon such a question the federal courts exercise their own independent judgment. The solution of the question of estoppel must be worked out by the aid of "general principles, and common to all courts." See Olcott vs. The Supervisors, 16 Wall, 678.

VIII.

We will now answer the contention of the defendant that the new complainants, Thomas McLeish and Joseph Bush, who, since the suit was brought, bought the undivided one-third of Leonard Carr in the land, and assumed to pay the assessments upon it, are estopped by reason of such assumption from challenging the validity of the assessment.

(a) To sustain their contention, the only authority appealed to was the unreported case, Caldwell against City of Columbus. 37 W. L. Bull., 270.

We contend that the Ohio Supreme Court in a later case has, in effect, decided the question the opposite way. We refer to the case already cited of Lewis vs. Taylor, supra. There were three cases decided by the court at the same time. In two of them, (Lewis vs. Symmes, and Bader et al. vs. The C. P. & B. Ry Co.,) this same question was agitated in the Circuit Court. (18 Circuit Court Reports, 448.) It was pleaded by the answer in the first named case that French, a lessee, had agreed to pay all taxes, assessments, etc., that had been assessed on the land; and in the other, that the plaintiff, the railroad company, which had purchased the land after the assessment was levied, had agreed to pay the assessment. In the first case a motion for a judgment on the pleadings, and in the second a demurrer to the answer, were sustained by the Circuit Court. In the pamphlet record printed in the Supreme Court these two rulings of the Circuit Court were assigned as errors by the petitions in error. The judgments of the Circuit Court were affirmed by the Supreme Court. It is true the Supreme Court did not discuss this question in the opinion. Nor does the syllabus mention it. The same thing is true of the decision in Caldwell against the City of Columbus;

for there was neither syllabus nor opinion. The truth is that neither side can derive much aid from any of these cases.

Against this contention of the defendant, which we are now trying to answer, we cite the case of State vs. Jersey City, 35 N. J. L., 381. There the purchaser of land promised to pay the assessments which were legal liens on the property he bought. The fourth paragraph of the syllabus states the true rule in a clear, concise and emphatic manner:

> "If a purchaser takes title to lands with knowledge of assessments against them while held by a former owner, and assumes to pay them in his deed, he may object to the legality of these assessments, in an action between him and the city, and the purchaser under the city."

In the opinion it is stated that the conclusion of the court is rested upon the principle that the purchaser only intended to pay legal liens, but if the assessments were illegal, there were no legal liens.

That is all that Thomas McLeish and Joseph Bush meant to do. In contemplation of law they only intended to pay the liens that *were legal:* indeed, the assumption clause in the deed expressly limits their promise to pay such assessments, taxes, etc., as were legal liens.

In another part of the opinion this is said:

> "A person who purchases subject to a mortgage and assumes to pay it, may still make any legal defense to a suit thereon. * * * *The principle is the same in the case of any similar encumbrance or charge upon land claimed by either party.*" (Page 385).

(6) The same principles of estoppel which we invoked in another part of this brief, should be applied to the solution of this question. It must be proved by the estoppel-asserter that he relied and acted upon the act of estoppel committed by the other party. This case is barren of any evidence on this point. The treasurer neither relied nor acted upon the promise of

Thomas J. McLeish and Joseph Bush to Leonard Carr; nor did the county commissioners. They could not have relied or acted upon it. Counsel for the other side will not deny the proposition, that no personal obligation rested upon the property owners to pay the assessment levied under the suburban statute.

In Dreake against Beasley, 26 O. S., 315, this question was decided, the court saying that they "understand the law to be that no taxes assessed upon land can be collected by a personal action against the owner, unless they are by law made a charge against him."

The assessment in that case was for the improvement of a road. In the statute under which the assessment in controversy here was levied, there is no provision making the assessment a personal obligation of the property owner.

Leonard Carr, being under no personal obligation to pay the asessment, the promise of his grantees, Thomas J. McLeish and Joseph Bush was, and is, a mere nudum pactum, and cannot be enforced either by Leonard Carr or by the treasurer. (Brewer vs. Maurier, 38 O. S., 550).

It is too firmly embedded in the law to be unsettled now, that to make the promise of the grantee of land to pay a mortgage available, his grantor must be personally liable for the payment of the mortgage debt. Crowell vs. St. Barnabas Hospital, 27 N. J. E., 656, in which such a decision was rendered, is approvingly cited by the United States Supreme Court in Keller vs. Ashford, 133 U. S., 610. The decisions concurring with this one are so numerous that it would require pages to state their titles.

That the rule is the same where the grantee assumes to pay any other liens such as assessments or taxes, needs no further support of authority.

See the two cases cited before. (State vs. Jersey City, Brewer vs. Maurier.)

(c) We appeal again to the decision in O'Brien against Wheelock, supra, to put down this contention of the defendant. There one of the allegations of the second bill of the bondholders was "*that certain other defendants had acquired title to some of said lands, by accepting deeds of conveyance expressly recognizing the liens of plaintiffs on said tracts.*" That means that such defendants recognized the liens of the assessment by promising to pay them, making it an exactly identical case with this. This recognition was relied upon by the bondholders as an estoppel against the land owners. They claimed that it prevented the defendant land owners from pleading the unconstitutionality of the statute. But, with all the other estoppels relied upon by them, this estoppel went down under the decision of Justice Harlan and Judge Wood.

REPLY TO ARGUMENTS OF OPPOSING COUNSEL WHICH ARE ANTICIPATED.

Opposite counsel may argue, as they did in the lower court, that the appellants never presented any claim for damages under Sections 3 and 4 of the statute. But their failure to present such a claim does not bar them from asserting the claim for relief against the assessment; they are not asking for damages in this case; they are not asking for compensation for any property taken.

The supposed contention of opposite counsel that the statute provided for due process of law, that due process of law was not denied to the complainants, and that the board of county commissioners was a tribunal invested with power to hear evidence, etc., is met and overthrown by the decision of the Circuit Court of the United States, in the case of *San Mateo* vs. *The Southern Pacific Railroad Company*, 13 Fed.

Rep., 722, and *Charles* vs. *City of Marion*, 98 Fed. Rep., 166, cited by us in our original brief.

Opposite counsel may argue that the "property of the appellants is especially benefited to an amount equal to the cost of the improvement, if not to an amount largely in excess of the cost thereof." It seems to us that it would require a great deal of temerity to make such an assertion in face of the fact that opposite counsel examined, in fact, only one witness upon the issue of special benefits; and the meaning of their assertion would be, that the testimony of that one witness is of more value than the testimony of all the witnesses for the appellants.

Opposite counsel may say that no appeal, as provided in Section 4687, et seq., Revised Statutes of Ohio, was taken by complainants from the orders and findings of the county commissioners above specified.

The sections referred to provide for appeals from final orders made by the county commissioners, establishing a county road, or altering or vacating a state or county road, or changing the width of a county road. They make no provision whatever for an appeal, in a case like the one now under consideration. In the case at bar the county commissioners did not establish a county road; nor did they alter or vacate a state or county road. The appellants are not asking for relief against an order establishing a county road, or vacating a state or county road, or changing the width of a county road; they are asking for relief against an order making an assessment upon their property; and these statutes make no provision whatever for an appeal from such an order.

The special statute under which the county commissioners acted is entirely independent of the general statutes as to roads.

The interpretation which opposite counsel will put upon the decision in *Norwood* vs. *Baker* will be too narrow. The court not only decided that private property could not be charged with an assessment in excess of special benefits, and that such an assessment would be taking private property, without just compensation; but it also decided, and decided just as unequivocally, that an assessment made by the foot front imports in itself that it was not in proportion to special benefits. This latter point cannot be obscured by quoting some of the court's opinion, and omitting all the rest.

Opposite counsel may say that the complainants had a right to present a claim for damages if their property was damaged by reason of the elevation of grade. But they had other rights, too; they had a right to have the assessment apportioned among the different abutting owners in proportion to the benefits derived by each owner's property from the improvement. That right is entirely separate and independent, from the right to present a claim for damages. The failure to present a claim for damages does not effect their right to have the assessment apportioned as the Constitution requires; that is to say, in proportion to special benefits. The decision in Norwood vs. Baker declares that the abutting property owner has two rights as to the assessment: First, the right to have it assessed in proportion to the special benefits between him and the public at large; and second, the right to have it apportioned in proportion to the relative special benefits, between him and the other abutting property owners.

The proposition that, when the benefit to the property of A is greater than the benefit to the property of B; because of the favorable or unfavorable location of the properties belonging to these parties, it is an unfortunate circumstance merely, does not harmonize with the decision in Norwood

against Baker. This court says there that when such a condition exists between A and B, that the assessment must be according to the relative special benefits, and that a failure to observe the rule is a violation of the constitutional right of B.

Opposite counsel fall back on the cases of *State* vs. *Mitchell*, 31 O. S., 592; *Tone* vs. *Columbus*, 39 O. S., 281; *Columbus* vs. *Sohl*, 44 O. S., 482; and *Columbus* vs. *Slygh*, 44 O. S., 484.

We have already tried to point out the vital distinction between these cases, and the case at bar, and the case of *Birdseye* vs. *Clyde*, cited in our brief. In those four cases, while the complaint was made against assessments, they were not illegal assessments. They were assessments made under an unconstitutional law, but the assessments themselves did not violate any constitutional or legal right of the property owners. It was not till the case of Birdseye against Clyde was reached that the court was called upon to decide the question, whether the property owner was obliged to pay an assessment which in itself violated some legal or constitutional right. In the first four cases mentioned, the court decided that the property owners who petitioned for the improvement, or participated in the election of commissioners to make the assessment, were estopped from objecting to the assessment, although it was made under an unconstitutional law; but in *Birdseye* vs. *Clyde*, there is an additional feature: the assessment expressly violated a legal right of the property owner in regard to its limit; and the court held that the owner's act of petitioning for the improvement, *although a waiver of objections to the legality of the improvement proceeding, was not a waiver of his right to have the assessment made according to law. That is precisely the contention in the case at bar.* Appellants petitioned, and they did other acts which estopped them from questioning the

legality of the improvement proceedings; but these acts do not estop them from challenging the assessment on the ground that it violated their constitutional rights, to wit:

(1) That the assessment was made regardless of the special benefits conferred; and

(2) That it was made in excess of the special benefits conferred.

These are just as much legal limits on the power of assessment as was the twenty-five per cent. limit, in *Birdseye* vs. *Clyde*. The right to have his property assessed in proportion to benefits, and to have the assessment no greater than the special benefits, is just as sacred as the right to have the assessment kept within the twenty-five per cent. limit fixed by statute. If there is any difference between them, they are more sacred than the other, because they are guaranteed by the Constitution, and not by statute, as is the twenty-five per cent. limit.

In the four cases upon which counsel rest, the question whether the *assessment itself violated* any legal or constitutional right, we repeat, was neither agitated before, nor decided by, the court.

Opposite counsel labor industriously to prove that the Federal courts will follow decisions of state courts where they have thereby established rules of property. But the four decisions of the Supreme Court of Ohio, relied upon by the opposite side, do not establish rules of property: the mere statement of their decisions proves this to be true. They decided that when a property owner petitions for an improvement of a street on which his property abuts, or participates in the election of commissioners whose office it was to make the improvement, and levy the assessment, he was estopped from challenging the assessment. How can such decisions be tortured into decisions establishing rules

of property? The rights and corresponding duties created by such estoppel conduct are simply those of contract, and not of property.

This court has jurisdiction of this case; because there is a federal question involved; because the suit arises under the Constitution; because a statute of the state contravenes the Constitution of the United States. The Supreme Court of the State of Ohio has never decided that a party who brings such a suit is estopped from challenging the validity of the statute, or of the acts done pursuant to it by reason of conduct which is construed to be estoppel in its character; the Supreme Court of the state would have no authority to render such a decision. Whether a party who brings a suit in the United States Court is barred of his right to question the constitutionality of a statute, under the Constitution of the United States, by estoppel conduct, is a question of which the Federal courts have exclusive cognizance.

Counsel on the other side cite numerous cases, but this precise question did not arise, and was not decided, in either of them. To show the fallacy of the contention by opposite counsel, it will be necessary to analyze some of the cases, as samples of all of them.

In *Orvis* vs. *Powell*, 98 U. S., 176, which was on error from the State Supreme Court, it was merely decided that a rule of property established by decisions of the state courts was binding on the United States Court sitting in that state; there was no question of estoppel decided; nor was it decided that estoppel conduct would bar one from questioning the validity of the state under the United States Constitution.

In *Beaupre* vs. *Noyes et al.*, 11 U. S., Sup. Ct. Rep., 296, which was also on error from the State Supreme Court, it was simply decided that, inasmuch as no federal question was

involved, the decision of the Supreme Court of the state disposed of the case; and in *Electric Co.* vs. *Dow*, 17 U. S. Sup. Ct. Rep., 645, the court simply refused to review the decision of the Supreme Court of the state because it was not based on any federal question. In neither of the two cases last named was it decided that when a complainant is held by the state court to be estopped, that he can get no relief in the Federal Court, as opposite counsel may interpret them.

Eustis vs. *Bolles*, 150 U. S., 361, may also be cited by counsel. That was on error to a decision of the Supreme Court of a state. The court merely decided that, unless the decision of the federal question by the State Court was necessary to the determination of the cause, the United States Supreme Court would not entertain jurisdiction.

The case of *Marrow* vs. *Brinkley*, 9 Supt. Ct. Rep., 267, is also a case on error to the Supreme Court of Virginia; and the resolution of the court was that, since it appeared that the decision of a federal question was not necessary to the determination of the cause by the State Court, and that such question was not actually decided, and that the judgment as rendered could have been given without deciding it, the United States Supreme Court would not review the decision of the State Supreme Court.

The cases of *Adams County* vs. *B. & M. R. R. Co.*, 112 U. S., 123; and *State ex rel.* vs. *F. & P. M. R. Co.*, 14 Sup. Ct. Rep., 586, are also cases on error from the State Supreme Courts. The court resolved that, as only a question of estoppel was decided by the State Supreme Court, and as it was broad enough to control the rights of the parties without disposing of the federal question, the decision would not be reviewed.

It does not seem necessary to consume any further time in discussing the numerous cases which may be cited by

opposite counsel. Each one of them merely decided when the United States Supreme Court will, and when it will not, review a decision of the state court in which there was a federal or non-federal question involved, and that when the decision of the latter question was broad enough to control all the rights of the parties, it would not be reviewed by the United States Supreme Court.

But the case at bar is brought in the United States Circuit Court, not in a state court. Therefore, these cases should not guide or control this court. The complainants raise a federal question. The defendant cannot deprive them of the right to have that question decided by pleading a defense that raises a non-federal question. That does not excuse the court from deciding the federal question. 102 U. S. Rep., 141; *Sawyer* vs. *Parish* &c., 12 Fed. Rep., 754, (8 par. of syllabus). A decision by this court of the question raised by the defense of estoppel, in favor of the defendant and against the complainant, would necessarily decide the federal question against the complainants.

Opposite counsel may say that the complainants can ask no greater relief from the courts of the United States than they could obtain were they to resort to the state court, and that, if, in the latter case, equity would afford no relief, the Federal Courts would give none. That involves the assumption that the state courts would deny the appellants relief. That they could not do, if they followed the decision in *Birdseye* vs. *Clyde*. The case which may be cited by counsel, *Ewing* vs. *St. Louis*, 5 Wall, 413, does not sustain their proposition. The complainant asked a court of equity to give him relief against the determination of an inferior board of special jurisdiction. In the state courts the review and correction of such a proceeding had to be obtained by a writ of certio-

rari. This court decided that a complainant could get no greater relief than this from the United States Court.

It may be asserted that there is no question made by the appellants as to the validity of the statute under consideration, or that the assessments violated any provision of the Constitution of the state. In the bill it is expressly alleged that the statute had been decided to be unconstitutional by all three of the courts of Ohio; the answer admitted that it had been so decided by the Common Pleas and Circuit Court, but denied that there had been such a decision by the Supreme Court. Opposite counsel will not dispute our statement that such a decision had been rendered by the Supreme Court in the case of *Bennington* vs. *Barron*, supra.

To the second and third points we answer that in the Johnson case, decided in 55 O. S., cited before, the assessment was not assailed until after several installments of the assessment had been paid. That fact did not deprive the complainant of the relief to which he was entitled. A similar decision was rendered by the Ohio Supreme Court in *Lewis* vs. *Symmes*.

It may be insisted that the appellants, by their petition, "adopted and acquiesced in each and every provision of the act," and that they agreed with the county and the purchasers of the bonds that the cost of the improvement should be assessed by the foot front. The petitioners in Birdseye against Clyde, the case which we have before cited, by their petition assented to all of such acts; and yet their mouths were not shut when they complained that the assessment was illegal.

If the cases of *Treasurer* vs. *Martin*, 50 O. S., 197, and *Mott* vs. *Hubbard*, 59 O. S., 199, should be cited, our answer is, that they are merely disciples of State vs. Mitchell, Tone vs. Columbus, Columbus vs. Sohl, and Columbus vs. Slygh, before cited; they go no farther than these cases went.

There is no ingenuity that can run a parallel between those cases, on the one side, and the case of Birdseye against Clyde, and the case at bar, on the other side. Here the appellants are attacking the assessment on the ground that it exceeds constitutional limits. By the United States Constitution the county commissioners were limited in levying assessments upon the property of the complainants, to one method namely, an assessment in proportion to special benefits, and in levying their assessment they were also limited, by the said Constitution, to an assessment that equaled the special benefits. The county commissioners trancended these limits. In Birdseye vs. Clyde, the village was circumscribed, in levying the assessment, by a statutory limit of twenty-five per cent. of the value of the property. The facts of that case, and the facts of the case at bar, make them exactly parallel; and any effort on the part of opposite counsel to show that we are wrong in this contention will be vain.

Making an application of this to the case at bar, there can be no essential difference perceived between the act of the complainants petitioning for the improvement, and the other subsequent acts which are imputed to them as estoppel conduct. If the other subsequent acts have no greater force and virtue as estoppel than the act of petitioning for the improvement, then, under the decision in Birdseye against Clyde, it logically follows that the complainants are not estopped, by such subsequent acts of so-called estoppel, from disputing the validity of the assessment.

Opposite counsel may undertake to perform the feat of showing that the decisions of the Supreme Court of the United States antecedent to the case of Norwood against Baker, sustain front foot assessments, and there are seventeen cases to which they may appeal. To show how confused they would be if they do this, it is only necessary to invite the court's atten-

tion to two of the cases cited: *Spencer* vs. *Merchant*, 125 U. S., 345, and *Walston* vs. *Nevin*, 128 U. S., 578. In Norwood against Baker, the same contention was urged upon the Supreme Court by counsel for the Village of Norwood; that is to say, that the other cases, especially Spencer against Merchant, supra, should control the decision of the case. But the court did not assent to that; on the contrary, it said this: "Nor do we think that the present case is necessarily controlled by the decision in Spencer vs. Merchant, 125 U. S., 345." The court distinguished it from Norwood against Baker. By looking at the case of Walston vs. Nevin, 128 U. S., 578, it will be seen that the court followed three or four of the other cases upon which we suppose opposite counsel will rely, Spencer vs. Merchant being at the head of the list. If Spencer vs. Merchant is distinguishable from the case of Norwood against Baker, so is Walston vs. Nevin and all the other cases relied upon by counsel.

An attempt may be made to differentiate the case of O'Brien vs. Wheelock, 95 Fed. Rep., 883, from the case at bar. All of the quotations from the opinion of Justice Harlan, which will probably be quoted, except the last one, relate expressly to the question as to whether the court should follow the decision of the Supreme Court of Illinois. The observations in these quotations have no relevancy whatever to the question of estoppel upon which we cited the case.

An attempt to enfeeble the decision in Birdseye against Clyde, as an authority in our favor, may be made, by observing that the petitioner in that case did nothing to promote the improvement, except to sign a petition. But that will overlook the fact that in one of the previous Ohio cases, Columbus against Slygh, 44 O. S., 484, the court had said that there was no essential difference between a petitioning for the improvement and participating in the election of commissioners to

carry the plan into execution. There is no act of estoppel imputed to the appellants in the case at bar that is more intense in meaning than a participation in the election of commissioners to carry out the plan of execution.

The claim will probably be made that the Federal courts have applied the rule of estoppel as broadly as the Supreme Court of Ohio; but it is not supported by the authorities. With the exception of one or two of the cases which will perhaps be cited, all of the cases involve situations where if estoppel had not been applied, fraud would have been permitted.

The case of Daniels vs. Tearney, 102 U. S., 415, it is true, involves the application of the principle of estoppel to conduct in pursuance of a statute which violated the Federal Constitution, a secession statute, but is clearly distinguishable from the case at bar. The party estopped knew that the act was unconstitutional before acting under it. The bond which he executed was for the payment of a claim valid against him and which it would have been a fraud to permit him to dispute. In the present case, the appellants did not know that the act was unconstitutional; nor is the claim a valid one against them, because it was not assessed according to any principle of special benefits, and exceeds such benefits, and is a demand of something for nothing.

The case of *Electric Co.* vs. *Dow*, 166 U. S., 489, was dismissed by this court because no federal question was involved and is therefore not in point.

In discussing estoppel, opposite counsel will omit a most important fact, namely, that the commissioners, in ordering the improvement to be made, estimated and fixed the cost at $7.25 per foot. (Record, 90). Every alleged act of estoppel done after that order was made was done with reference to the cost of the road thus fixed, and on the faith of appellants that the limit would be observed. Every time they did an act

which is now construed to be estoppel by our opponents, the appellants had a right to assume that the road would cost only $7.25 per foot, and not $11.25.

As to the two sewers petitioned for and built, they will forget that the uncontradicted evidence of the engineer shows that that was not done until the next year after the assessment, which the appellants are now attacking, was levied, and also the next year after the improvement was finished.

This evidence also shows that the cost of the sewer was not a part of the assessment here assailed. How, then, can it be said that the Commissioners were induced to make the improvement of the road and levy an assessment by an act which was done a year after both the improvement was made and the assessment levied? There is no element of estoppel in the act.

Opposite counsel will dwell on the fact that appellants joined in a petition asking the Commissioners to extend the period for the payment of the bonds to twenty years.

But the evidence shows that the County Commissioners never acted upon the petition. (Page 75 of Record). How, then, can that act be tortured into an estoppel? The Commissioners never having relied upon, or acted upon it, and never having been induced to do anything, to change the position of the county for the worse, it has no element of estoppel.

They will dwell upon the written communication in which the appellant withdrew objection to the improvement and the assessment of their real estate. That is to say, the appellants withdrew all objection to an assessment that should equal the estimate, the cost of the improvement, $7.25, previously fixed by the Commissioners. That communication can not be perverted into meaning that they thereby authorized the Commissioners to levy any kind of an assessment upon their property, and especially an assessment that would exceed the value of

their property, as the evidence conclusively shows—an assessment which amounts to confiscation.

They will also mention as an act of estoppel the petition asking for the cancellation of that part of the contract which required the contractor to sod the sides of the roadway.

But defendants did not show that that act added a dollar to the cost of the improvement; on the contrary, it is manifest that it decreased the cost. Moreover, the petition was signed and preferred with reference to the fact that the improvement was to cost $7.25 per foot.

They will also mention, as an act of estoppel, that one of the appellants served as a member of the board appointed by the Commissioners. But that board had no function to perform other than electing the superintendent. It had no control over the work, or over the superintendent and contractor, or the assessment. Besides the act was done with reference to the cost of the improvement, at $7.25 per foot, and upon the presumption that it would not exceed that sum.

They will also mention as an act of estoppel the payment by the appellant of seven installments of the assessment levied upon their property.

But how can that be construed to be an estoppel? The payment of so much of the assessment was a benefit, and not an injury, to the county. The appellants were obliged to pay $7.25 per foot front; and if they paid any more, it was a benefit to the county. One of the essential elements of an estoppel is that the estoppel-asserter must "sustain actual damage," if the estoppel is not enforced. In Railroad Co. vs. DuBois, 12 Wall., 47, this court decided that the estoppel-asserter must have been misled "to his hurt" by the act of estoppel.

Bispham's Equity, Sec. 291.

How can it be said that the county was misled to its hurt, or that it was actually damaged, as other cases put it, by the appellants paying seven installments of the assessment?

Precisely the same reflections apply to the alleged act of estoppel, namely, that the appellants remained silent from 1891 until 1899. The longer they remained silent, the more installments of the assessment were paid; and the Supreme Court of the state has decided, as we showed, that the payment of the installments was not an estoppel.

Opposite counsel may appeal to the lengthy paper which was filed with the Commissioners, and which purports to be signed by two of the appellants, as an act of estoppel. (Record, 94). It purports to be an agreement upon their part that they would not set up a defense against the collection of any assessment upon their property. They say it was signed and filed on March 31, 1890. The record does not disclose any such date; on the contrary, it can easily be inferred from the record (pages 109, 110 and 111) that it was not signed until in August or September, 1891, about the time the improvement was completed, if it was ever signed at all; *but the record shows that neither of the appellants ever signed the paper.* There was an absolute failure of proof of its authenticity and genuineness, on the part of the appellee. There was such an absolute want of evidence that the lower court did not consider it as an act of estoppel. We refer to the opinion of Judge Thompson. (Record, 110).

They may characterize the decision in French vs. Barber Asphalt Paving Co., supra, as a departure from some supposed rule that had existed prior thereto; and they assume that the Supreme Court in French vs. Barber Asphalt Paving Co. returned to the doctrine from which there had been a departure in the other case. But in none of these subsequent cases did the court reverse or modify the decision in

Norwood vs. Baker. On the contrary, in the French case, it was expressly stated that "Courts of equity are always open to afford a remedy, where there is an attempt under the guise of legal proceedings, to deprive a person of his life, liberty or property, without due process of law."

And it was expressly stated that the case of Norwood vs. Baker belonged to that category of cases. In one of the other of that group of cases, Town of Tonawanda vs. Lyon, the court expressly deferred to the decision in Norwood vs. Baker, and stated that "a case of actual confiscation of private property to public use" should be decided by the precedent of Norwood vs. Baker.

True, in French vs. Barber Asphalt Paving Co., the court did say that a denial, by the statute, of a preliminary hearing as to special benefits, did not constitute a taking of property without due process of law. But it was not decided that when an assessment had been made in excess of special benefits, that the property owner would not be entitled to relief in an appropriate action or suit.

Opposite counsel may quote, with satisfaction to themselves, the passage from the opinion of Justice Shiras in Detroit vs. Parker, another of the same group of cases, in which it was stated that it had not been shown that the property of the complainants in that case "had been charged differently from that of other lot owners."

But they will ignore the evidence in the case at bar when they state that this applies to this case. The undisputed evidence shows that the property of the appellants was worth less per foot front than other property along the same improvement; that none of the property along the east end of the improvement was injured in any degree by the excavation for the road, but on the contrary that it was left as "nice terrace property." The evidence conclusively shows that

the property of the appellants was depressed from ten to fourteen feet below the road, by reason of the improvement, and that to make their property accessible, they had to spend $5,000 for dirt to make a fill, so that the land would be on a grade with the road. None of this evidence for the appellants was contradicted. Moreover, the evidence of the appellee corroborates the evidence of the appellants, that there was a gross inequality in value between the property of the appellants and most of the other property along the improvement; and yet the county commissioners levied the same rate of assessment upon their property as they did upon the other property which had not been injured by the excavation for the road. How, in the face of these facts, can it be said that the property of the appellants had not been "charged differently from that of other lot owners?"

It may be argued, that the legislature may provide a definite rule of apportioning the benefits resulting from the paving of a street, and that property owners are not entitled to notice or hearing at the time the assessment is made. But the decisions in these cases do not preclude the appellants from obtaining relief against the collection of an illegal assessment, which has been made, for such right the statute, Section 5848 of the Revised Statutes of Ohio, confers.

They may argue that the statute itself provided that the commissioners should estimate the special benefits. We have anticipated and endeavored to answer this argument. They will not attempt to reconcile Section 17 of the act with Sections 6 and 8 of the act, which expressly commanded the commissioners to make the assessment by the front foot method. So, that even if the commissioners had found, as they ought to have found, that the different property owners would not be equally benefited by the improvement, that all the abutting property would not be uniformly benefited

by it, they could not have made a different assessment on the appellants' property from that made on the property of other lot owners. It had to be the same on each piece of property; the commissioners could not do it otherwise, without violating the mandate of those sections. Further, the record does not show that the commissioners made an apportionment of the special benefits.

What they did was not a performance of that duty at all, according to the decision in Chamberlain vs. Cleveland, 34 O. S., 551. The commissioners found what the value of the property was before, and what it would probably be after, the improvement; but they did not ascertain the amount, the value, of the special benefits, nor did they apportion the burden among the different tracts of property according to the relative benefits.

It may be said that "six separate and written applications for changes and additions to the improvement" were filed by these appellants, and others, with the commissioners. The record does not show any such condition of fact. It may be claimed that the commissioners were induced by the estoppel conduct of the appellants, to sell bonds to the amount of $110,000. But, if the decision of the State Supreme Court in Birdseye vs. Clyde is of any value, this fact is immaterial. The bonds there were issued by the council in reliance upon the petition of the property owners for the improvement. *The property owners suffered the improvement to proceed to completion without objection*, it was said in the opinion. The court expressly decided that their acquiescence in the improvement did not mean anything more than this, that they were obliged to submit to a legal assessment; that it was not equitable to assume, from their acquiescence in the construction of the improvement, and from their silence in not objecting to it, before it was completed, by

injunction or otherwise, that the lot owners intended to donate their property to the public, or that they intended to consent to the confiscation of their property. So we say in this case at bar that, when the appellants signed the petition about the circle, and the waiver, on pages 75 and 76 of the record, and when they made no objection to the issuance of the bonds, they did not intend to do anything more than submit to a legal assessment upon their property; that is, in this case, to $7.25 per foot front; that it would be inequitable to assume, from these acts, that they intended to donate their property to the public, or that it should be confiscated for the benefit of the public.

What was done by the commissioners after the improvements began may be exaggerated; it may be intimated that there were a number of changes and modifications in the plans and specifications. The evidence does not show any such condition of fact. The only changes made were in regard to sodding the side walks and the circle. It will be admitted that if the county, or the commissioners, as assumed agents of the property owners, exceeded their authority, the property owners would not be bound by their acts. They did exceed their authority, when they made an assessment in excess of $7.25 per foot front. They had substantially agreed with the property owners that the assessment should not exceed that amount; the property owners had a right to rely upon that; and, as between them and ther agent, so-called, they are not obliged to pay an assessment that exceeded that amount, unless they did some act which required a larger expenditure of money.

We have already discussed this phase of the case and sustained the propositions, there stated, by a decision of the Supreme Court of the state in Storer vs. Cincinnati, 4 C. C., 278; 24 Weekly Law Bulletin, 371. If the construction of

the circle made the cost exceed $7.25 per foot front, under the ruling in that case, the appellants would have to help pay for it; but, it is equally true, that the ruling there forbade the commissioners making an assessment for anything more than that cost, above the $7.25 per foot.

If, as the opposite counsel contend, this court will follow the decisions of the state court, we are contented; provided, the court will follow the pertinent decision of the State Court in the Storer case.

In Wight vs. Davidson, 181 U. S., 371, the Supreme Court did announce that the property owner might be estopped from questioning unjust taxation, by his estoppel conduct, but the passages from the opinion merely lay down the general rule. This rule does not, in any way affect the decision in O'Brien vs. Wheelock, 95 Fed. Rep., 883, to which we have appealed in this brief.

Opposite counsel may say that the manifest purpose of the appellants and others in signing and filling the petition, was "to cause the county commissioners to act in the premises, and to cause the improvement to be made in the manner and to the extent it was made." So did the petition in Birdseye vs. Clyde, still relief was given. In O'Brien vs. Wheelock the land owners were more active in promoting the improvement than the appellants were in the case at bar. They actively solicited the passage of the statute under which the improvement was made. They knew all about the provisions of the statute, more than Doctor Shepard, one of the appellants, knew about the Ohio statutes. There they "participated in causing the bonds to be issued and sold" to the purchasers; they caused the assessment to be made by signing the petition to the Pike county court; they "participated in procuring the bonds to be sold by signing a petition for the second assessment;" they also "devised a plan for the organization of a corporation composed of persons

interested in the lands," for the purpose of making the improvement authorized by the act. Yet none of these intense acts of estoppel, according to opposite counsel's philosophy, barred the right of the land owners to relief in the opinion of the Circuit Court of Appeals.

Again, we call attention to the fact, that one of the reasons given by Justice Harlan, for the conclusion of the court, has an intense application to the case at bar. The statute of Ohio, which authorized the improvement, provided that the road as improved should be maintained and kept up as an improved road, and by section 16 of the act there was a board of control provided for. When the appellants and other property owners committed the so-called acts of estoppel, they had a right to assume that the road would be kept up and maintained by that board, after it was completed; they acted upon their faith that such would be done. As Justice Harlan said in the case cited, "it cannot be supposed that any land owner would have become connected with the scheme embodied in the act" of the legislature, unless the maintenance of the improved road "was assured."

It may be said that the County Commissioners, in making the improvement, "were at all times absolutely passive in all they did in connection with this improvement." The property owners, however, had no control whatever over the improvement, as did the property owners, through their Commissioners, in the Tone and Mitchell cases.

In discussing the question, whether Thomas McLeish (it should be James McLeish) and Joseph Busch, two of the appellants, are entitled to any relief, because of the stipulation in the deed from Leonard Carr to them, providing that they should pay all assessments that might be liens upon the proprety, opposite counsel may assume that the case of Thompson vs. Thompson, 4 O. S., 333, is a precedent in favor of their

contention. But the court will observe that the decision was based upon the assumption that the purchaser was bound to indemnify his grantor against the incumbrance. In that case, if the purchaser had failed to pay the mortgage, the mortgagor would have been obliged to pay it as surety; he would have been personally liable; a judgment might have been rendered against him and execution issued against his other property. All this was based on the fact that there was a personal obligation owing by the mortgagor to the mortgagee for the payment of the debt. There is no such obligation in the case at bar. The statute expressly provides that the assessment shall be a lien upon the land; there could be no personal obligation resting upon the owner to pay the assessment, unless the statute so provided; but it made no provision to that effect; and this proposition can not be controverted by opposite counsel.

The same criticism is applicable to the case of Cramer vs. Leeper, 26 O. S., 59.

The case of Caldwell vs. Columbus, is not a precedent; because, in the case at bar, McLeish and Busch only agreed to pay *whatever assessments were legal liens upon the property.* If our contentions should be sustained, the assessment was not a legal lien upon the property which they purchased from Leonard Carr.

Opposite counsel, in discussing the case of Lewis, Auditor, vs. Taylor, 18 C. C., 443, will overlook the fact that there were three cases decided by the opinion rendered in that case, so that while what they may say about the assessment being placed on the tax duplicate after the lease was made, containing the assumption, is true, in the case of Lewis vs. Symmes' heirs, it is not true in the case of Lewis vs. Railroad Company. In the latter case there was an assumption of the assessment, contained in a deed for the land made subsequent to the assessment, and the placing of the same on the tax duplicate, for the court dis-

itnctly announces this opinion, stating the principle for which we contend:

"The railroad company, having agreed to pay assessments, the court in construing that contract would hold it to mean '*legal and valid assessments,*' and they would have the right to question and have determined by a competent court the validity of the assessment."

Moreover, the court said with reference to the Symmes case:

"In Symmes case we think that the lease to French makes no difference so far as this question is concerned. That was a contract between plaintiff below and French; that French agreed to pay assessments, and if these parties are ultimately compelled to pay these assessments, they would have a right to proceed against French to recover for the amount that they had paid. It in no way estops them from questioning or testing the validity of the assessment."

The court thus in no sense puts its decision in the Symmes case on the ground which opposite counsel claim that it does.

This defense, just discussed, is only made against two of the appellants.

In support of their contention that there was laches on the part of the appellants, opposite counsel may say that the twenty-foot strip of land was dedicated by the appellants and others. There is no evidence in the record to support that contention. They simply made no claim for damages.

They may also say that the record of the commissioners shows that the appellants consented to the proceedings taken in regard to the strips of land taken from the property of Miller and Benignus. They will simply quote from the record of the county commissioners. That simply shows what the commissioners found. Besides, the record of the commissioners only shows that the property holders consented to *the amount* that was found to be the value of the land taken from Miller and Benignus.

They may also say that Dr. Shepard testified that he knew the improvement was made under the act passed by the legislature on March 26, 1890, and that he, with others, asked the commissioners to make the improvement under that law. So did the land owners in Birdseye vs. Clyde, know of the statute, and so did the owners in O'Brien vs. Wheelock know of the statute; they actively solicited the passage of the statute; and yet, these were not held to be sufficient to bar them from relief in a court of equity against illegal assessments.

Opposite counsel may cite the case of Wright vs. Thomas, 26 O. S., 346. How does this case help the appellee? So far as it goes, it supports our side of the case, for the court decided that the complainant in that case was entitled to injunctive relief against the collection of the assessment, notwithstanding he delayed his action until the improvement was completed. The question was not before the court, and the court did not decide the question, how long he might have delayed his action after the work was completed. It is immaterial, therefore, whether the case has ever been overruled or modified.

The case of Kellog, Treas., etc., vs. Eli, 15 O. S., 64, may be relied upon by opposite counsel. But they will fail to state that one of the reasons for the conclusion of the court in that case was that, under the statutes, the land owner had the right to appeal, or go upon error, to the Common Pleas Court, from the decision of the county commissioners establishing the ditch. In the case at bar the appellants had no remedy from the decision of the county commissioners, either by appeal or error.

Again, the statement in the opinion, by implication at least, that the property owner should have warned the con-

tractors or laborers, is manifestly erroneous. That would not have availed anything in the case at bar. Just as soon as the contract was entered into between the county commissioners and the contractor, the contractural rights of the latter were fixed. There was nothing to complain about before the contract was entered into by the contractor. After the contract was made the property owners could not have had the improvement enjoined, because the contractural rights of the contractor had been fixed. This was expressly stated to be the rule in the Storer case by the Circuit Court of Cincinnati, and affirmed by the State Supreme Court.

Opposite counsel may put stress upon isolated parts of the testimony of Morrison, Martin, Orebaugh, Tracy and Heffner. But they cannot controvert our proposition that the evidence, by an overwhelming preponderance, shows that the property of the appellants was assessed nearly $500 more per acre than it was worth. The evidence which we have quoted in detail, not only the testimony of witnesses on our side, but some from their own side, cannot be overturned by simply mentioning the testimony of certain witnesses, and the pages on which their testimony may be found.

It may be said:

"The power to assess the property of appellants is limited only by the power conferred upon the county authorities to construct the improvement." But it will be admitted the statute which conferred that power "has been repeatedly held to be in conflict with the Constitution of Ohio." If the assessment made by the county commissioners was void, under the application of the decision in Norwood vs. Baker, there was no legal assessment. That is to say, if the assessment exceeded the special benefits, to the extent of the

excess, it was illegal. It was legal to the extent of the special benefits. The assessment, so far as it exceeded the special benefits, was just as much illegal as was the excess of the assessment above twenty-five per cent. of the value of the property, in the Birdseye case. There can be no sound distinction drawn between the two as illegal assessments.

Respectfully submitted,

David F. Pugh, PUGH & PUGH,

Attorneys for Appellants.

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MAR 21 1904
JAMES H. McKENNEY,
Clerk.

(18,833)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 217.

WILLIAM SHEPARD, CHARLES McLEISH, THOMAS McLEISH AND JOSEPH BUSCH,

APPELLANTS,

VERSUS

O. E. D. BARRON, TREASURER OF FRANKLIN COUNTY, OHIO,

APPELLEE.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

BRIEF FOR APPELLEE.

Henry A. Williams,

Augustus F. Seymour,

~~Dyer, Williams & Seymour,~~

~~Taylor, Seymour & Wenner,~~

Attorneys for Appellee.

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O. E. D. BARRON, TREASURER OF FRANKLIN COUNTY, OHIO,

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BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

Appellants complain of the decree of the Circuit Court solely upon constitutional grounds, and seek to be relieved from the payment of an assessment for a local improvement levied upon their property, on the theory that the statute under which such

assessment was made is repugnant to the provisions of Section 1 of the fourteenth amendment to the constitution of the United States, in the following respects:

(1) Because there was no provision in the statute for notice to the property owners at the time when the assessment would be made, and consequently no opportunity was given to them to make objection to the amount estimated as special benefits and that thereby appellants were denied due process of law.

(2) That said statute in its terms necessarily provided for and permitted the taking of the property of appellants for public use without just compensation, and that the amount assessed against such property was in effect confiscation under the guise of taxation.

(3) It is urged as error in the decree of the court below that the court found and determined that appellants were by their conduct estopped from maintaining their suit and were, therefore, not entitled to the relief prayed for in their bill.

The assessment, the collection of which was sought by the action in the court below to be restrained, was levied under and by virtue of the provisions of an act of the General Assembly of the state of Ohio, passed March 26, 1890. (87 Ohio L., 113). On March 31, 1890, a petition was filed with the board of county commissioners of Franklin county, Ohio, signed by appellants, and therein praying for the construction of a permanent roadway on East Broad street extended in said county. In May ,1890, said county commissioners granted the prayer of said petition, and ordered said East Broad street upon which the property of appellants abutted to be paved with asphalt to the extent of about forty-eight hundred feet beyond the city limits.

In the month of August, 1890, said commissioners contracted for said paving and by October 1, 1891, said improvement was completed. In December following the cost of the improve-

ment was assessed upon the abutting property in accordance with the provisions of the aforesaid act. The whole number of feet frontage upon both sides of said East Broad street and abutting the improvement was nine thousand, six hundred and fifteen feet of which the property of appellants embraced eleven hundred and eleven feet, being practically one-ninth of the whole frontage abutting on said improvement, and the property of the appellants was assessed a total of $12,-586.07. On or about August 4, 1890, the county commissioners issued bonds in the sum of $50,000, the proceeds of which were ordered to be applied and were applied towards paying for said improvement, as provided for by said act of March 26, 1890; and on or about August 1, 1891, said county commissioners ordered additional bonds of the amount of $60,000 to be issued, the proceeds of which were to be applied and were applied to the payment of the cost of said improvement. (Transcript of Record, pp. 95, 101, 102). The appellants were a co-partnership at the time the petition for said improvement was filed, and during the entire time the improvement was being constructed. And in all of the proceedings, had for the purpose of making said improvement, were acting together and under the firm name of The Alum Creek Ice Company, and during the progress of said improvement said Alum Creek Ice Company was represented by either Dr. William Shephard or Charles McLeish, each of whom had full authority to represent said firm. The property which abutted on said improvement was owned by said appellants and used by them in conducting the business of The Alum Creek Ice Company. (Transcript of Record, pp. 36, 37, 45, 71, 77).

For the purpose of inducing the board of county commissioners of Franklin county, Ohio, to make the improvement of East Broad street in the manner and to the extent the same was afterward constructed, appellants actively promoted and assist-

ed in making all of such improvement and acquiesced in and authorized the making of all of the expenditures represented by the assessment complained of in their bill and authorized and consented to the assessment of the cost thereof against their said property by the foot front, to the extent and in the manner set forth in appellants' bill. The more material of these acts of appellants in the promotion of said improvement are as follows:

(1) The said appellants, together with others, signed the original petition, which was filed with said board of county commissioners on the thirty-first day of March, 1890, and within five days after the passage of the act which they are now assailing as unconstitutional, wherein the making of said improvement was asked for; and said board of county commissioners had no authority to order and would not have ordered said improvement to be made except for the acts and requests of appellants and others that said improvements be made, under said law. (Transcript of Record, pp. 62, 76, 77, 94, 95).

(2) On or about the ——— day of ————, 1892, the appellants under the name and style of The Alum Creek Ice Company with others, filed with the county commissioners of Franklin county, a request in writing (Exhibit D, Transcript of Record, p. 73), that a fifteen-inch sewer pipe be laid on the south side of said street, and that a twenty-four inch sewer pipe be laid on the north side of said street, and that a suitable gutter be laid on the side next to the curb of the two outer driveways on said Broad street, and "that the expense of said work be assessed against our respective property on said street, the same as other expenses for making said improvement are levied and paid." The construction of said sewers was necessary for the proper completion of said improvement, and said sewers were a direct benefit to the abutting property of appellants and others.

(3) On or about the ——— day of ———, 1890, and before said improvement was completed the said appellants filed with said Board of County Commissioners, a petition in writing (Exhibit B, Transcript of Record, p. 74), signed by their own individual names with others, in which petition they requested said board of county commissioners to cause all bonds issued for the payment of the expense of said improvement to be for a period of twenty years from the date thereof, and wherein they stated further that if said county commissioners could extend the time to twenty years for the bonds already sold, such extension of time would be satisfactory to said appellants.

(4) On or about the twenty-ninth day of June, 1891, said appellants under the name of The Alum Creek Ice Company, together with other land owners abutting upon said improvement, filed with said board of county commissioners a written communication (Record, pp. 92 and 93), whereby they *expressly withdrew all objection to said improvement and the assessment on their said real estate therefor,* on condition that the Columbus Land Association, one of the abutting property owners, would secure and pay the entire expense of removing all the earth upon the circle in East Broad street and beautifying and adorning said circle. Said circle was established by the board of commissioners on the eighteenth day of August, 1890 (Transcript of Record, p. 93), and became a part of said improvement, and was declared to be a public circle, and was two hundred and fifty feet in diameter, the land for which was donated by the Columbus Land Association, and said circle was dedicated to the public use.

(5) On or about the second day of September, 1891, the appellants, William Shepard and Charles McLeish, and also The Alum Creek Ice Company, filed with the county commissioners of Franklin county, Ohio, a petition in writing (Tran-

script of Record, pp. 72 and 73), in which petition they asked for a cancellation of that part of the contract with one N. B. Abbott, which provided for sodding the sides of the roadway, and in said communication the said parties, together with other abutting property owners each promised to see that grass seed was sown upon the sideways of said East Broad street, and agreed to take upon themselves the care and charge of the same.

(6) In Section 13 of the Act of March 26, 1890, the board of county commissioners were authorized to designate two or more owners of property abutting on said improvement who, together with the county surveyor, should constitute a board, which board should elect a superintendent, and in pursuance of this provision, one of the appellants, William Shepard, was appointed by the Board of County Commissioners a member of said board on the nineteenth day of May, 1890, and said Shepard afterward accepted said appointment, and acted as one of the road commissioners until the improvement was finally completed. (Transcript of Record, pp. 70 and 92).

(7) Appellants have paid seven annual installments of the assessments levied for the construction of said improvement as charged against their land, from the year 1892 to 1899, inclusive, without protest or objection, each annual payment being $1258.61. (Transcript of Record, pp. 4, 84).

(8) Appellants have remained silent and have failed to object to or complain of said assessments from 1891, when the same was placed upon the tax duplicate against the property, until the month of June, 1899, when the bill herein was filed, and during all the years between said dates; nor did they make any objection or protest while the improvement was in the process of construction. (Transcript of Record, p. 1).

(9) On the —— day of ——, 1890, the appellants, William Shepard and Charles McLeish, representing 1111 feet fronting upon said improvement signed and filed with the Board of

County Commissioners a waiver for the purpose of causing said commissioners to make and complete this improvement, and for the further purpose of removing any suspicion concerning bonds already sold and to be sold, and to assure said commissioners that no objection would be made by them or any of them concerning the legality of any and all action taken by said commissioners in connection with the construction of said improvement.

This waiver is of such great importance to a proper understanding of the relation existing at the time between the appellants and the Board of County Commissioners representing Franklin county, Ohio, and indicates so strongly the interest and activity manifested by appellants in the promotion of said improvement that we copy the same in full at this point in our brief, although the same appears in the record at pp. 94 and 95.

"To the Honorable Board of County Commissioners of Franklin County, Ohio:

Whereas, on the thirty-first day of March, 1890, a petition signed by the subscribers hereto, was by us presented to the Board of County Commissioners of Franklin county, Ohio, praying for the extension of East Broad street in this county, beginning at the bridge across Alum Creek on said street, and advancing eastwardly therefrom to Cassady road, which said portion of said street lies in Marion township, said county, which said improvement was in said petition prayed to be made under the provisions of an act of the General Assembly of Ohio, entitled, 'An Act to authorize county commissioners in counties in which there are situated cities of the first grade of the second class to improve roads extending from such cities and other roads or streets in certain cases,' passed March 26, 1890, which said petition stated with what material said street should be paved, and what provisions should be made for sidewalks, gutters and other passages for carrying off water, and between what points said street was to be improved, and the kind of material of a permanent character said commissioners desired to be used in said improvement, and

Whereas, said petition was signed by all persons owning property abutting upon the portion of said street in said petition

asked to be improved, said petition stating the number of feet between the termini of said improvement, and

Whereas, such proceedings were had by said Board of County Commissioners in said petition, and in accordance with said act of the General Assembly, that the prayer of said petitioners was granted and said improvement was ordered to be made in accordance with the prayer of said petition, and

Whereas, said original petition as well as other papers filed since said original papers, and certain orders made by said Board of County Commissioners relating to said improvement, have been lost or mislaid, and

Whereas, since the making of said original order by said Board of County Commissioners directing said improvement to be made some important changes in the plan, extent and character of said improvement have been ordered by said Board of County Commissioners, and have been made or are now being made at the written request of each and all of—including the construction of a circular park in said street and sewers for proper drainage and other things not herein particularly mentioned, and

Whereas, by reason of said changes and extensions the cost of said improvement has been increased in a large amount beyond that contemplated, and which would have been sufficient according to said original petition and plan, and

Whereas, some doubts have arisen as to the legality of the proceedings of said Board of County Commissioners in said matters and of bonds that have been or may hereafter be issued by said Board of County Commissioners for the purpose of raising the means to pay the cost and expense of said improvement.

Now, therefore, in consideration of said improvement as the same has been and now is being constructed, and in order that the bonds heretofore issued and to be issued to pay for said improvement may not lie under suspicion or remain unsold by reason of the absence, or loss of said original or other papers and orders, or by reason of the other matters, acts and things hereinbefore stated, we, and each of us, hereby agree that such petition hereinbefore recited was filed, signed by us as herein stated, and that we will not set up as a defense against the collection of any assessment upon our said property abutting upon said improvement for the payment of bonds issued, or to be issued on account thereof, any informality or irregularity aris-

ing from the absence or loss of any of said papers, or any of the other matters and things hereinbefore recited, but agree that said improvement has been and now is being legally made and constructed, and we hereby request that you execute and issue such further amounts of bonds as shall be necessary to pay the costs of said improvement.

Signed, Logan M. Bullit, per the Columbus Land Association, by T. E. Powell, director; feet front, 3775.34 feet.

Mary P. Markeson, by C. E. Markeson, agent in fact; feet front, 375.54.

F. C. Sessions, feet front, 747.41.

William Shepard and Charles McLeish, feet front, 1111.

J. C. Lunn, 361.87.

The heirs of Henry Stansberry, deceased, by John R. Stansberry, agent in fact, 550 feet."

The record further discloses that said Board of County Commissioners immediately after this waiver was filed, and relying upon it, passed a resolution to deliver to the Ohio Savings Bank $60,000 of bonds theretofore advertised for sale. (Transcript of Record, p. 95).

(11) On the first day of July, 1899, a warranty deed was executed by Leonard Carr, one of the original complainants in this case as grantor to James McLeish and Joseph Busch, now appellants, conveying one-third interest in the premises described in the bill herein, in which deed as is stipulated herein, the following exception appears, "Except a mortgage for $6000 given by William Shepard, Charles McLeish and wife and Leonard Carr and wife to F. F. Huffman, as recorded in mortgage record, 156, p. 560, Franklin county, Ohio, Records, and excepting all taxes and assessments of whatever kind and nature that may be a lien on the one-third part of the Marion township property hereby conveyed, and all taxes, liens and assessments that may be due and unpaid on the other property hereby conveyed, being hereby assumed by the grantee herein as part of the purchase price for said premises."

ARGUMENT.

Applying the rule to this case, that the acts and operations of all public officials are deemed to be rightly conducted according to law, and the further rule that the presence upon the tax duplicate of any county of a charge against a person or property of a tax or an assessment carries with it the *prima facie* presumption that the tax or assessment is valid, and the amount thereof due and unpaid, the burden of proof is in the first instance thrown upon the appellants who are challenging the assessment, to establish its invalidity. (Sec. 1104, Revised Statutes of Ohio).

This burden of proof appellants attempted to meet on the trial in the Circuit Court as a legal proposition by stating and claiming the unconstitutionality of the statute under which the assessment was made by virtue of the provisions of Section 1 of the 14th amendment. If they can succeed in establishing such unconstitutionality, we concede that they have made out a case which overcomes the presumption of validity set forth in the statute.

While not seriously contraverting the facts disclosed by the testimony and the exhibits in the record and hereinbefore severally stated, counsel for the appellants contend (1) that the assessment levied under this act was and is in excess of the special benefits conferred on the property of appellants, and (2) that the act contravenes the Federal constitution, because there is no provision in the law for the ascertainment of the amount of special benefits conferred upon the abutting property by the improvement. In other words, it is claimed that by the provisions of the act the ascertainment of special benefits is

necessarily excluded from consideration in the plan and method adopted for the selection of the property benefited. This conclusion of counsel is based upon the assumption that the assessment of the cost of a local improvement upon abutting property by the foot front is necessarily obnoxious to the Fourteenth Amendment of the Constitution of the United States.

The foot front method is not contrary to the Federal Constitution.

The mode of assessing the cost of local improvements upon the abutting property by the foot front has been in operation for many years in most if not all of the states, and has been repeatedly sustained by the courts of last resort whenever such scheme of apportionment has been brought to their attention. As has been stated by Mr. Justice Harlan in the case of Norwood v. Baker, 172 U. S., 269, "Exact equality in taxation is seldom if ever attainable," but it has been the experience of administrative and taxing officers that the assessment by the foot front plan comes as near an equal uniformity in distribution of the burden of the cost of the special assessment as any method that has been adopted. The constitutionality of such method was never questioned so far as we have been able to learn from the examination of the authorities until the case of Norwood v. Baker, *supra*, decided December 12, 1898. Since the announcement of the opinion in that case by Mr. Justice Harlan, both the Federal and state courts, out of proper respect for the distinguished tribunal whose decision he announced, and in an attempt to follow what they understood to be the legal effect of that decision, have been led to modify the rulings formerly made respecting assessment by the foot front, and the apparent departure, as some of them conceived, of the highest judicial body in this country from the established doctrine led many to rush into court, as the complainants have done in this

case in an attempt to cast from their property a charge for a local improvement whose justice and validity they had not theretofore thought of challenging or questioning.

Shortly after the decision of the Baker case by the Supreme Court of the United States, Judge Phillips, of the Circuit Court of the Southern District of Missouri, had occasion to consider the question of assessment by the foot front in a case brought before him from the city of Springfield. (Fay v. The City of Springfield, 94 Fed. Rep., 409). In that case Judge Phillips followed the rule of the Supreme Court as he understood it be announced in the case of Norwood v. Baker, and plants his ruling as he expressly declares in his opinion on page 410, of the report, squarely upon the authority of the Norwood v. Baker case. These two Federal cases, and the case of Chamberlain v. Cleveland, 34 Ohio State, 551, to which we shall have occasion to refer more at length later on, are the only cases cited by counsel to support the proposition that the levy of an assessment for the payment of the cost of a local improvement by the foot front method in itself necessarily implies that special benefits were not considered, and therefore that such an assessment is obnoxious to the constitutional inhibition. The two Federal cases cited are so much at variance with the uniform holding of this court, both before and after the announcement of the decision in the Norwood case that we deem it proper to refer to the decisions relative to the foot front doctrine as it has been treated in the adjudications.

In the case of Cass Farm Company v. Detroit, 181 U. S., 396, decided April 29, 1901, an assessment for the cost of paving, by the foot frontage was sustained. On the same day the decision in the cases of French v. Asphalt Paving Company, Tonawanda v. Lyon, Wight v. Davidson, Webster v. Fargo, Detroit v. Parker, Schumate v. Heman and other assessment cases were announced, in which the doctrine of the

case of Norwood v. Baker although not overruled in terms, was so restricted and limited in its operation as to deprive it of any controlling force as any authority in a street assessment case.

Indeed, as was aptly stated by Mr. Justice Harlan in the dissenting opinion in the French case, "I submit that this case can not be distinguished from Norwood v. Baker upon the ground that the village of Norwood proceeded without legislative sanction." Mr. Justice Shiras also defined the limits of the Baker case in the following language on page 345, of the opinion:

> "It may be conceded that courts of equity are always open to afford a remedy where there is an attempt, under the guise of legal proceedings, to deprive a person of his life, liberty or property, without due process of law. And such, in the opinion of a majority of the judges of this court, was the nature and effect of the proceedings in the case of Norwood v. Baker."

But there is no such a state of facts in the present case.

In the case of Tonawanda v. Lyon, 181 U. S., 389, this court held:

> "It was not the intention of the court, in that case, to hold that the general and special taxing systems of the states, however long existing and sustained as valid by their courts, have been subverted by the Fourteenth Amendment of the Constitution of the United States. The purpose of that amendment is to extend to the citizens and residents of the states the same protection against arbitrary state legislation affecting life, liberty and property, as is afforded by the Fifth Amendment against similar legislation by congress."

That case was an action to restrain the corporate authorities of the town of Tonawanda, New York, from enforcing payment of certain assessments against tracts or parcels of land belonging to the complainant, situated in the town of Tonawanda, and abutting on Delaware street in said town. The principal ground of the objection against the assessment was

that the method of meeting the expense of grading and paving said street was by assessing the same against the lots abutting on the street, according to the frontage thereon, and that the statutes and proceedings thereunder which provided for that method were contrary to the provisions of the Constitution of the United States, in that thereby the land of the complainant would be taken for public use without just compensation, and he would be deprived of his property without due process of law. On page 391, Mr. Justice Shiras, after stating the case, delivered the opinion of the court in the following language:

> "The complainant in the court below did not put his claim for equitable relief upon any allegation that, in the proceedings to pave Delaware street and to assess the cost of the improvement upon the abutting property, there had been any departure from the provisions of the statute, or that there had been attempted any discrimination against him or his property. Nor was it denied that it is the settled law of the state of New York that the method prescribed, of meeting the expense by apportioning the entire cost of such an improvement upon the abutting land according to the foot-front rule, is a valid exercise of legislative power. *The People v. Mayor, &c.*, 4 N. Y., 419; *Spencer v. Merchant*, 100 N. Y., 585.
>
> "What was claimed was that a state statute, which directs municipalities to assess the whole expense of paving any highway therein upon the lands abutting upon the highway so improved in proportion to the feet frontage of such lands, without providing for a judicial inquiry into the value of such lands and the benefits actually to accrue to them by the proposed improvement, is unconstitutional and void. And it was held by the court below that, notwithstanding the courts of the state may have held otherwise, it was its duty to follow the decision of this court in the case of *Norwood v. Baker*, 172 U. S., 269, which was regarded by the court below as establishing the principle contended for, and accordingly the defendants were enjoined from enforcing payment of the assessment. But we think that, in so understanding and applying the decision in *Norwood v. Baker*, the learned judge extended the doctrine of that case beyond its necessary meaning.

"It was not the intention of the court, in that case, to hold that the general and special taxing systems of the states, however long existing and sustained as valid by their courts, have been subverted by the Fourteenth Amendment of the Constitution of the United States. The purpose of that amendment is to extend to the citizens and residents of the states the same protection against arbitrary state legislation affecting life, liberty and property, as is afforded by the Fifth Amendment against similar legislation by congress. The case of *Norwood v. Baker*, presented, as the judge in the court in the present case well said, 'Considerations of peculiar and extraordinary hardships,' amounting, in the opinion of a majority of the judges of this court, to actual confiscation of private property to public use, and bringing the case fairly within the reach of the Fourteenth Amendment.

"The facts disclosed by the present record do not show any abuse of the law, nor that the burdens imposed on the property of the complainant were other than those imposed upon that of other persons in like circumstances; and it is obvious from expressions in the opinion of the trial judge, that he reached his conclusion because constrained by what he understood to be the principle established by the *Norwood* case."

In the opinion of Mr. Justice Shiras, in the case of Cass Farm Company v. Detroit, *supra*, p. 397, it is said:

'We learn from a statement in the opinion of the Supreme Court that among other grounds of relief stated in the bill was the following: 'That the provisions of the charter and of the paving ordinances of the city, in so far as the same provide for an assessment of the cost of paving upon the abutting property in proportion to the frontage of such property, were in violation of the Constitution of the United States, and the amendments thereof, and therefore null and void.'

"The State Supreme Court disposed of this contention in the following language:

" 'In paving cases the rule has been settled in this state by many decisions that it is competent for the legislature to authorize the cost of paving streets to be assessed upon the abutting property according to frontage.

"'It was said by Mr. Justice Cooley, in *Sheley v. Detroit*, 45 Michigan, 431:

"'We might fill pages with the names of cases decided in other states which have sustained assessments for improving streets, though the apportionment of the cost was made on the same basis as the one before us. If anything can be regarded as settled in municipal law in this country the power of the legislature to permit such assessments and to direct an apportionment of the cost by frontage should by this time be considered as no longer open to question. Writers on constitutional law, on municipal law and on the law of taxation have collected the cases and have recognized the principle as settled; and if the question were new in this state we might think it important to refer to what they say, but the question is not new. It was settled for us thirty years ago.

"'We should feel inclined to follow the opinion of the Supreme Court of the United States in *Norwood v. Baker*, inasmuch as it was based on the Fourteenth Amendment of the Constitution of the United States, if that were a paving case; but that was a street opening case, and until that court shall pass upon the question in the exact form in which it is here presented, we shall feel bound to follow our own decisions.' *The Cass Farm Improvement Co. v. Detroit*, 83 N. E. Rep., 108."

Continuing, Justice Shiras says:

"We have recently held that it was not the intention of the Fourteenth Amendment to subvert the systems of the states pertaining to general and special taxation; that that amendment legitimately operates to extend to the citizens and residents of the states the same protection against arbitrary state legislation affecting life, liberty and property as is afforded by the Fifth Amendment against similar legislation by congress, and that the Federal Courts ought not to interfere when what is complained of is the enforcement of the settled laws of the state applicable to all persons in like circumstances and conditions, but only when there is some abuse of law, amounting to confiscation of property or deprivation of personal rights, as was instanced in the case of *Norwood v. Baker*, *French v. Asphalt Paving Co.*, *Tonawanda v. Lyon*, *Wight v. Davidson*, *ante*, 324, 389, 371."

In the case of *Detroit v. Parker*, 181 U. S., 399, the court again announced the rule in accordance with the Cass Farm Company case and departed from the doctrine of *Norwood v. Baker*. The foundation for the bill in equity in the Parker case which was brought before the Supreme Court for review was the allegation that the statutes of the state of Michigan and the ordinances of the city of Detroit, which provide for the paving and grading of the streets, the assessment of which was sought to be enjoined, were in violation of the rights of the complainant under the Fourteenth Amendment to the Constitution of the United States, in that they do not provide for any hearing or review of assessments at which the property owner can show that his property was not benefited to the amount of such assessment, but that the same shall be made arbitrarily according to the foot front. The case was disposed of by the learned judge in the United States Circuit Court for the Eastern District of Michigan as follows:

> "It is the claim of complainant that the charter, in the provisions mentioned, that the entire cost of the street improvements, except for street and alley crossings, etc., shall be assessed against the abutting property by the fronting measurement, without any regard to the special benefits received by the property or their relation to the cost of the improvement, is in conflict with the Fourteenth Amendment of the Constitution of the United States, and is null and void; that such legislation constitutes taking of property without just compensation, and is a denial of equal protection of the law. The case of the *Village of Norwood v. Baker*, 172 U. S., 269, is the foundation for this position, and seems fully to sanction it. * * * The Supreme Court of Michigan has declined to depart from its decisions sustaining the constitutionality of like statutes providing for assessments per foot front, on the ground that the ruling in Baker v. Norwood must be confined to the facts of that case and has no application to an assessment for paving. With all respect for that learned tribunal, I am constrained, under the cases cited, to a different opinion of the decision, and to follow the Supreme Court

of the United States upon the construction of the Fourteenth Amendment of the Federal Constitution."

Accordingly a decree was entered in accordance with the prayer of the bill, by the Circuit Court, and a perpetual injunction was issued. (See *Parker v. Detroit,* 103 Fed. Rep., 357).

In delivering the opinion, this court, on page 401, referred to the Cass Farm Company case, and quoted with approval the language we have already cited in this brief, and as a result thereof, reversed the decree of the Circuit Court and remanded the case to that court with direction to dismiss the bill of complaint.

The other Federal cases cited by counsel of *Fay v. The City of Springfield,* 94 Fed. Rep., does not seem to have been reviewed by the Supreme Court of the United States, but a like case from the state of Missouri was carried from the Supreme Court of Missouri to the Supreme Court of the United States, and in that case practically the same question is decided as is presented in the case of *Fay v. Springfield.* The later case reported is *Heman v. Allen,* in 156 Missouri Reports, page 534, but in the Supreme Court of the United States, it was known as *Shumate v. Heman,* and is reported in the 181 U. S., 402, and practically reverses the case of *Fay v. Springfield,* relied upon by counsel for plaintiff in error.

The constitutionality of a statute which authorizes or requires an assessment to be levied according to the frontage of the property abutting thereon is carefully considered in the case of *French v. Barber Asphalt Paving Co.,* 181 U. S., 325 (another Missouri case), and it is there held that according to the weight of authority that question is one of legislative expediency. As before stated, the cases which were decided by the Supreme Court of the United States at the same time as *French v. Barber Asphalt Paving Co.* seem to dispose of any contention that an assessment levied by the foot front mode is illegal, and

hold that such mode of assessment is not repugnant to any provision of the Federal Constitution.

For further authority, see:

Paulsen v. Portland, 149 U. S., 30.
Fallbrook Irrigation Dist. v. Bradley, 164 U. S., 112.
Bauman v. Ross, 167 U. S., 548.
Parsons v. Dist. Columbia, 170 U. S., 45.
Webster v. Fargo, 181 U. S., 623.

In the third edition of Cooley on Taxation, just issued, the rule is thus declared at page 1217 of the second volume:

> "In many instances where streets were to be opened or improved, sewers constructed, water pipes laid or other improvements entered upon, the benefits of which might be expected to diffuse themselves along the line of the improvement in a degree bearing the same proportion to the frontage, the legislature has deemed it right and proper to take the line of frontage as the most practicable and reasonable measure of probable benefits; and making that the standpoint to apportion the benefits accordingly. Such a measure of apportionment seems at first blush to be perfectly arbitrary and likely to operate in some cases with great injustice; but it can not be denied that in the case of some improvements, frontage is a very reasonable measure of benefits; much more just than value would be; a practice approaching equity as nearly as any estimate of benefits made by the judgment of men. However that may be the authorities are well united in the conclusion that frontage may lawfully be made the basis of apportionment."
>
> Citing numerous Federal and State cases.

Foot front plan of assessment has been uniformly sustained in Ohio.

The decisions of the Supreme Court of Ohio on the question of assessing the cost of local improvements upon the abutting property owners by the foot frontage are in entire accord with the Federal holdings, and those of the courts of last resort of

most of the states. The rule has been declared in the following cases, among others:

Ernst v. Kunkel, et al., 5 Ohio St., 521.
Northern Indiana R. R. Co. v. Connelly, 10 O. S., 160.
Hill v. Higdon, 5 O. S., 246.
Upington v. Oviat, 24 O. S., 232.
Wilder v. Cincinnati, 26 O. S., 284.
Cincinnati v. Oliver, 31 O. S., 371.
Jaeger v. Burr, 36 O. S., 164.
Haviland v. Columbus, 50 O. S., 471.
Parsons v. Columbus, 50 O. S., 460.
Sandrock v. Columbus, 51 O. S., 317.
Findlay v. Frey, 51 O. S., 390.
Schroeder v. Overman, 61 O. S., 1.
Walsh v. Sims, 65 O. S., 211.
Shoemaker v. Cincinnati, 68 O. S., 603.

The statute is not subject to the objection that due process of law is denied by its provisions for want of notice to property owners, before the levy of the assessment therein provided for.

The term "due process of law," as used in the Fourteenth Amendment of the Constitution of the United States and in many of the State Constitutions, is not an inflexible term, meaning essentially the same thing at all times, but is necessarily adaptable so as to meet different conditions as they may be presented.

As is well stated by Mr. Justice Field in the case of *Hager v. Reclamation District* No. 108, 111 U. S., 701, 707, "What constitutes that process it may be difficult to define with precision so as to cover all cases. It is no doubt wiser, as stated by Mr. Justice Miller in *Davidson v. New Orleans*, to arrive at its meaning 'by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decision may be founded.' 96 U. S., 97, 104. It is sufficient to observe here that by 'due process' is meant one which, following the forms of law, is

appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty or property which may result in the deprivation of either without the observance of those general rules established in our system of jurisprudence for the security of private rights.

Hurtado v. California, 110 U. S., 516, 536.

"The appellant contends that this fundamental principle was violated in the assessment of his property, inasmuch as it was made without notice to him, or without his being afforded an opportunity to be heard respecting it, the law authorizing it containing no provision for such notice or hearing. His contention is that notice and opportunity to be heard are essential to render any proceeding due process of law which may lead to the deprivation of life, liberty or property. Undoubtedly, where life and liberty are involved, due process requires that there shall be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard; so, also, where title or possession of property is involved. But where the taking of property is in the enforcement of a tax, the proceeding is necessarily less formal, and whether notice to him is at all necessary may depend upon the character of the tax, and the manner in which its amount is determinable. The necessity of revenue for the support of the government does not admit of the delay attendant upon proceedings in a court of justice, and they are not required for the enforcement of taxes and assessments. As stated by Mr. Justice Bradley, in his concurring opinion in *Davidson v. New Orleans*: 'In judging what is "due process of law" respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or some of these; and if found to be suitable or admissible in the special case, it will be adjudged to be "due process of law," but if found to be arbitrary, oppressive and unjust, it may be declared to be not "due process of law.'"

In the case of *Detroit v. Parker*, 181 U. S., 399, the Supreme Court decided that an assessment to pay for the paving and grading of a street which was improved under a statute which did not provide for a hearing or review of the assessment at which the property owners could show that the property was not benefited to the amount of such assessment, and that such assessment was levied arbitrarily according to foot front, was not illegal. The syllabus in that case was as follows:

> "An assessment for the cost of a street improvement as made arbitrarily according to the foot front is not in violation of the Constitution of the United States for failure to provide any hearing or review thereof at which the property owner can show that his property was not benefited to the amount of the assessment."

In the opinion of Mr. Justice Shiras, a statement is made of the facts, which applies verbatim to the case under consideration:

> "There was no allegation or proof that in the proceedings which resulted in the making of the improvements and in assessing complainant's lots for a portion thereof, there had been any disregard of the provisions of the statutes and ordinances, or that complainant's property had been charged differently from that of other lot owners."

In the case of *French v. Barber Asphalt Paving Co.*, 181 U. S., 324, already quoted, the court held: "The apportionment of the entire cost of a street pavement upon the abutting lots according to their frontage without any preliminary hearing as to benefits may be authorized by the legislature, and this will not constitute the taking of property without due process of law."

In the case of *Parsons v. District of Columbia*, 170 U. S., 45, Mr. Justice Shiras, on page 54, plainly points out the distinction between a tax or assessment imposed by direct exercise of the legislative power, calling for no inquiry into the weight of the evidence, nor for anything in the nature of a judicial exam-

ination, and a tax or assessment imposed upon property according to its value to be ascertained by assessors on evidence. He declares that "In the former case no notice to the owner is required, but that in the latter case the officers, in estimating the value, act judicially, and a notice and an opportunity to be heard are necessary. In giving the opinion of the Court (*Hager v. Reclamation District*) it was said by Mr. Justice Field (page 709), 'Of the different kinds of taxes which the state may impose, there is a vast number of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes, * * * and generally specific taxes on things, or persons or occupations. In such cases the legislature, in authorizing the tax, fixes its amount, and that is the end of the matter. If the tax be not paid, the property of the delinquent may be sold, and he be thus deprived of his property. Yet there can be no question that the proceeding is due process of law, as there is no inquiry into the weight of evidence, or other element of a judicial nature, and nothing could be changed by hearing the tax payer. No right of his is, therefore, invaded.' "

It is apparent from the foregoing that due process of law does not necessarily mean a judicial investigation or inquiry of the formality pursued by the courts. It further follows that due process of law does not necessarily mean in taxing or assessment cases that notice shall be given to the parties to be affected. It means only, as we take it, in the light of these authorities, that the party complaining shall be treated throughout all the steps relating to the assessment in the mode and manner prescribed by law and given the same rights, the same opportunities for hearing, and the same treatment as is accorded to all other persons in like condition. If a notice to him will subserve no useful purpose, and if upon notice he were to appear, the procedure would not be affected or changed, nor his

condition benefited or improved, the absence of notice does not deprive him of any right, or violate the requirement of due process of law.

In the recent case of *Turpin v. Lemon*, 187 U. S., 51, this court again had occasion to consider the meaning of the term "due process of law," and commented upon it in the following language:

> "Exactly what due process of law requires in the assessment and collection of general taxes has never yet been decided by this court; while it has been held that notice must be given to the owner at some stage of proceedings for condemnation or imposition of special taxes, it has also been held that laws for assessment and collection of general taxes stand upon a somewhat different footing, and are construed with the utmost liberality, sometimes even to the extent of holding that no notice whatever is necessary. (Mr. Justice Field's definition of "Due process of law," in *Hager v. Reclamation District*, 111 U. S., 701, followed), and the Fourteenth Amendment is satisfied by showing that the usual course prescribed by the state laws requires notice to the taxpayers and is in conformity with natural justice."

The act in question, however, does provide for notice in Section 3, as follows:

> "Whenever the commissioners of such county shall receive such petition they shall appoint a time and place for the hearing of said application, not less than four weeks thereafter, publish a notice of such hearing in some newspaper of general circulation in the vicinity of the proposed improvement for not less than two consecutive weeks, once each week, and cause copies of such notice to be given to all owners of property fronting upon the proposed improvement, their agents or attorneys, at least two weeks before said hearing."

This notice was important and necessary in order that property owners who might be affected thereby should be informed that the authority of the commissioners had been invoked by proper petition, and that the question of their future action

respecting the improvement would be taken or considered at a certain designated time and place. The receiving of such notice was in itself notice to said property owner of all the steps and processes which might follow under and by virtue of the act under which it was given, and no second notice was necessary. It is not claimed that such notice was not given to the grantor of plaintiff in error.

Assuming the law to be valid in all respects other than the giving of notice, the property owner was bound to have knowledge of all it provided and of all that might be done by virtue of its provisions.

Appellants are estopped to contest the assessment.

If, however, the court should determine that the act under which the improvement in question was made contravenes the provisions of the Fourteenth Amendment to the Federal Constitution, as pleaded in appellants' petition, even then appellants are not entitled to the relief for which they ask. They are seeking the intervention of a court of equity, and under the facts clearly established by the evidence, they have put themselves in such a position that they cannot be heard to complain of the improvement, the benefits of which they now attempt to challenge.

It is our contention both under the State and Federal authorities, that the constitutional rights bestowed by the amendments to the Federal Constitution against unjust taxation, and the taking of property without due process of law, given for the protection of private property, may be effectually waived by those affected thereby who consent either expressly or by implication to such action respecting their property, as might otherwise be invalid because of constitutional inhibitions. This doctrine is supported by the decision of the Supreme Court of

Ohio in the case of *State v. Mitchell,* 31 O. S., 592. In that case the rule was enunciated that,

> "Notwithstanding the unconstitutionality of the act, where the abutting lot owners have caused a street to be improved under the act, and bonds of the city to be negotiated to pay for the improvement, all who have participated in causing the improvement to be made, are estopped from denying the validity of an assessment made in accordance with the act to pay such bonds."

The question again came to the attention of the Supreme Court in connection with the same improvement in the case of Tone v. Columbus, 39 O. S., 281. In that case the Ohio Court elaborated the doctrine theretofore announced by it in the Mitchell case, and determined that certain acts therein specified resulted in an estoppel against all persons asserting the unconstitutionality of the act. The court further defined what facts should be present in order to create an estoppel by silence.

This case was followed by the case of Columbus v. Sohl, 44 O. S., 479. Therein the court explained the basis of the rule on which the doctrine of estoppel in such cases is founded in the Ohio decisions. At page 482, the court say:

> "We see no reason why, in this case, an owner may not have acted by his agent as well as by himself. It was not a question of jurisdiction. The law was invalid, and no authority was derived from it for the making of the improvement beyond the extent to which it had been adopted by all concerned as a scheme for improving North High street. Its provisions simply furnished the terms of an agreement among the concurring property holders, and the basis of a commission from them to the agencies of the city for the improvement of the street; and the rights and liabilities of all parties, including the city, are to be determined by the law of contract and agency, and not by any statutory powers that may have been intended to be conferred by the legislature, for the act being invalid could confer none."

The Court further say at page 483:

> "The power to direct the improvement to be made and to make an assessment being referred to a voluntary agency, conferred by the property owners upon the city, must derive its validity from what is done in the execution of the agency, and not from any supposed jurisdiction conferred on the city by the statute in question, that could only have attached to a given state of facts, required to exist at the time the so-called ordinance was passed, and could not have been helped by any subsequent facts prior to the order for the improvement of the street and the issuing of its bonds by the city."

Applying this rule to the facts of the case at bar, we ascertain that appellants signed, with other abutting land owners, the petition by which the county commissioners were asked to improve the extension of Broad street, and by which the machinery which produced the improvement in question was set in motion. That afterward, they with others, filed with the county commissioners a request in writing that certain sewer pipes should be laid on the north and south side of the improvement; that a suitable gutter be laid next to the curb on the two outer driveways, and that the expense of said work be assessed against their property in the same manner as other assessments for the making of an improvement were to be levied and paid; that they filed with the county commissioners a petition in writing in which they requested the county commissioners to cause the bonds to be issued for the payment of the expense of said improvement to be for a period of twenty years from the date thereof; that they signed and filed with the county commissioners written communications wherein and whereby they withdrew all objection to the improvement and the assessment of their real estate therefor, on the condition that The Columbus Land Association, one of the abutting property owners, would assume the entire expense of removing the earth in the circle in the extension of said street; that they signed and filed with

the county commissioners a petition in writing, in which they asked for the cancellation of a portion of the contract with N. B. Abbott, and that in compliance with said petition, the county commissioners procured the cancellation of the contract so asked for; that afterward they filed a written communication with the county commissioners, in which they made certain recitals with respect to the loss of the original petition, and certain recitals with respect to proceedings which had theretofore been had with respect to the construction of said improvement, and the fact that doubts had arisen as to the legality of said proceedings and of the bonds that had been, or might thereafter be issued by said board of county commissioners for the purpose of raising the amount to pay for the costs and expenses of said improvement, and in which written communication they recited and declared that

> "In consideration of the said improvement, as the same has been and is now being constructed, and in order that the bonds heretofore issued and to be issued to pay for said improvement may not lie under suspicion or remain unsold by reason of the absence or loss of said original or other papers and orders, or by reason of the other matters, acts and things hereinbefore stated, we, and each of us, hereby agree that such petition hereinbefore recited was filed, signed by us as herein stated, and that we will not set up as a defense against the collection of any assessment upon our said property abutting upon said improvement for the payment of bonds issued, or to be issued on account thereof, any informality or irregularity arising from the absence or loss of any of said papers, or any of the other matters and things hereinbefore recited, but agree that said improvement has been and now is being legally made and constructed, and we hereby request that you execute and issue such further amounts of bonds as shall be necessary to pay the costs of said improvement."

That William Shepard, one of appellants, was appointed by said county commissioners and acted as one of the Board of Improvement, provided for by the act in question; that in con-

sequence of the request contained in the written communication aforesaid, and in consequence of the petition theretofore signed and filed by appellants, the board of county commissioners of Franklin county, Ohio, issued bonds in two series to the extent of $110,000.00 to pay for the cost of said improvement. The bonds so issued have been declared by the United States Circuit Court of Appeals of the Sixth Circuit to be county obligations in a suit brought by bondholders against the county and the county of Franklin, by an order of the same court has had issued against it a writ of mandamus to compel it to pay said bonds, either by the levy of a general tax, or from the general funds of the county.

> See case Board of County Commissioners vs. Gardiner Savings Institution, 119 Fed. Rep., 36, Mr. Justice Day delivering the opinion of the court.

In the case of Columbus v. Slyh, 44 O. S., 484, the Supreme Court held that a party could be estopped to complain of an assessment by actively participating in and encouraging the construction thereof subsequent to the filing of the petition therefor. In that case the Ohio Court decided that there was no

> "Essential difference between petitioning for the improvement and participating in the election of commissioners to carry the plan into execution. If commissioners had not been selected the scheme would have failed; so that those who participated in the election of commissioners promoted the improvement under the law as much as those who petitioned for it in the first instance."

In the case at bar, the appellants not only signed the petition for the improvement, but also petitioned the commissioners for each successive change or modification thereafter made in the plan and procedure, and made public declaration of their waiver of all objection to the improvement and the assessment of their property for the costs thereof.

The rule in Ohio, as interpreted in the cases above cited, is that where the law is unconstitutional the principles of contract

and agency apply, and the party will be called upon to pay his proportionate share of all indebtedness incurred in the execution of the voluntary agency conferred on the board of county commissioners by the terms of the law and the petition filed with them by the property owners. If the board does not exceed the authority thus conferred, and there is no such claim, and there is no fraud practiced, such as would release the property owner in a court of equity, and none such is claimed, he would certainly be held for the full amount of the assessment placed against his property for the improvement of the road or street, notwithstanding the fact that the law under which the improvement is made may be held to be unconstitutional.

The rule established in the Sohl case has not been disturbed by any subsequent decision of the Ohio Supreme Court in any case where the act under which an improvement has been made has been declared unconstitutional. Under the authority of this case an abutting property owner who has actively promoted the improvement and caused it to be completed, is bound to pay an assessment levied for the construction of the same, as long as fraud and bad faith on the part of the commissioners is not proven. The commissioners in such case are held to be the agents of the property owners, and as long as they keep within the authority conferred by the terms of the law, and the petition of the property owners therein, such property owners are responsible for all costs and assessments incurred in completing the improvement thus authorized to be made. If, however, the commissioners in the execution of the powers and authority conferred upon them by the property owners in such case exceed their authority, and the assessment levied is largely increased by such unauthorized acts or conduct, then it is doubtless true that upon a proper pleading and proof the property owners might be relieved in a Court of Equity to the extent of such

increase, but no such case is made by the pleadings or the evidence in the case at bar.

If the law is unconstitutional, the relation between the parties is purely one of contract. Each and all of the various sections of the act, together with the applications contained in the petition filed by the property owners, and subsequent petitions and waivers and other acts amounting to estoppel, constitute such contract, and they must be construed and interpreted together in order to determine the rights and liabilities of all the parties concerned.

The court will remember that the property owners, including appellants, in their petition invoked the action of the board of county commissioners to construct this improvement under and by virtue of the act under consideration. In the petition by way of description of the kind and character of the improvement desired they designated the nature and character of material that was afterwards adopted and used, and asked the board to widen and extend the road substantially in the manner that it was afterward widened and constructed. In other words, considering the act as unconstitutional, the appellants, by the petition they filed, specifically made this act a part of the contract between the county commissioners and themselves in compliance with the decisions of the Ohio Supreme Court theretofore rendered in such cases.

The power to assess the property of appellants is therefore limited only by the authority to construct the improvement conferred upon the county officials by the petition which the appellants signed. Such petition expressly provides the kind, character and extent of the improvement which the property owners invoked the action of the county authorities to make, and the commissioners having executed that authority, and having constructed the improvement substantially in the manner and form asked, and having levied an assessment against the property

designated within the taxing district, to an amount equal to the cost thereof, and having cast upon the county an obligation to the extent of such cost by the special solicitation of appellants and others, as shown by the waiver filed and signed for that purpose, it is now too late to enjoin the collection of this assessment, upon the evidence shown by the record in this case.

These observations are in entire accord with the doctrine announced by the Ohio Supreme Court in the case of Birdseye v. Village of Clyde, 61 O. S., 27. This case is cited by counsel for appellants, and seems to constitute one of the straws, at which, in their desperation, they are grasping. It is true that in the Birdseye case the court held that,

> "The owner is not estopped to maintain such an action (that is an action to enjoin the collection of an assessment for an improvement of a street) by having acquiesced in the construction of the improvement, nor by petitioning therefor and thereby consenting to the raising of certain proportion of its cost by assessment on all abutting property."

It will be observed in the Birdseye case that it was not claimed that the act under which the local improvement was made, and by virtue of which the assessment was levied, was unconstitutional. But on the contrary, its constitutionality was conceded. The act under which the improvement was made was a special act authorizing any village having a certain population at the last Federal census to improve its streets and construct sewers. The proceedings in question were had under such act, which was applicable to the village of Clyde, and as the court suggested, probably to that village only. The contention was, that inasmuch as the act made particular provision for such proceedings by the particular class of corporations to which it applied, its effect was to exclude any limitation imposed by the general statute (Sec. 2270 of the R. S. of Ohio) with respect to the amount of the assessment that might be levied upon abutting property, and that it contained in itself no limitation except

that the total assessment should not exceed two-thirds of the cost of the improvement. It was contended that the plaintiffs in the case were estopped from contesting the assessment against their property because, with the knowledge that the improvement was under construction, they suffered it to proceed to completion without objection. Or, that if all the plaintiffs were not so estopped, those of them were estopped who signed the petition that was presented to the council requesting the improvement to be made. The court declared that all of the plaintiffs knew of the progress of the improvement, and made no objection to its construction, or to any of the proceedings under which it was constructed, and the court says, on page 37:

> "This acquiescence on their part would be sufficient to estop them from attacking the validity of those proceedings. But they had no knowledge of the amount of the assessment charged against their lots, and could have none, until the assessing ordinance was passed; and they promptly interposed with their injunction as soon as they learned the assessment exceeded twenty-five per centum of the taxable valuation of their lots. Silence or assent to the making of the improvement could not operate as an estoppel to challenge the correctness of the assessment, for until the plaintiffs had knowledge of the assessment, it was their right to assume that it would be made in conformity with the law, and not in violation of the positive prohibitive provisions of the statute. To hold otherwise would require them not only to take notice at their peril of the illegal action of the public authorities, but to anticipate that in their official action they would disregard their legal duties. Their silence or acquiescence bound them no further than to submission to a proper assessment against their property, legally imposed."

The distinction between the Birdseye case and the case at bar is marked. In the Birdseye case there was a constitutional statute under which the improvement was being made. This statute, after having read into it the provisions of the general act, Section 2270, which the court held to be a part of the legis-

lation in question, contained a statutory limitation on the taxing power of twenty-five per cent. of the value of the abutting property as assessed for taxation. The court held that the property owners, asking for action under that law, had the right to presume that the provisions of the law would be followed, and that there could be no question of estoppel against acts of taxing officers which were contrary to the law under which the improvement was invoked. In other words, in the Birdseye case the taxing officers did not act under the law, but contrary to it. In the case at bar there is no claim that the County Commissioners did not pursue accurately and with due form every requirement of the act under which they were supposed to be operating, and by virtue of the provisions of which the appellants requested them to act.

In this case, as a matter of law, there is no "legal" assessment in the sense of the term as employed in the Birdseye case, since the act under which this improvement was constructed has been repeatedly held to be in conflict with the constitution of Ohio, as being special legislation on a subject of general nature. It falls, therefore, not under the doctrine of the Birdseye case, but under that of the Mitchell, Tone and Sohl cases, which have special application to the facts stated in this case.

The general statute (Section 2270) discussed in the Birdseye case does not apply to counties, and therefore would not in any event apply to this case. The power to assess the property of appellants is limited only by the power conferred on the county authorities to construct the improvement. As hereinbefore stated, the petition expressly provides for the kind, character and extent of the improvement which the property owners invoked the action of the county authorities to make, and the commissioners having executed that authority, and having constructed the improvement substantially in the manner and form asked and having levied an assessment against the prop-

erty designated within the taxing district pro rata and equitably upon all property owners therein to an amount equal to the cost of said improvement without protest or objection on the part of appellants, and entirely upon the strength of the acts, conduct and written petition and waivers of said parties, appellants are now too late to invoke the extraordinary remedy of injunction to restrain the collection of any part of this assessment.

We contend that a different rule applies in cases where the act of the legislature is declared to be constitutional from those wherein an unconstitutional act is under consideration. In the former case the public authorities are permitted and are presumed to construct an improvement in accordance with the provisions of such law, and of the other general statutes applicable to such case. The property owner may, when required to act, insist upon all the protection afforded him by any and all of the general statutes when by his act and conduct he merely sets in motion the public machinery which results in the construction of the public improvement, and he cannot be deemed to waive any of his statutory or constitutional rights. After the filing of his petition in such case the statutes governing the rights of all parties concerned control the conduct of public officials in all matters connected therewith.

Where the law is unconstitutional, however, and the extent of the authority conferred on the public authorities is circumscribed and controlled by the principles which operate in the interpretation of contracts, property owners can have no relief from the legitimate result of their acts and conduct unless the public officials exceed their authority in the premises.

Under the act in question here, until the property owners took the initiative and the owners of property representing a majority of the feet front along the improvement, filed a petition under the unconstitutional law, the public authorities had

no power to act, and were without any jurisdiction under said law. The property owners having taken advantage of said act, and having empowered the commissioners to proceed under its provisions, cannot be heard to object to the enforcement of each of the provisions contained in the law, which they set in operation.

Storer v. Cincinnati, 4 C. C., 279, cited by counsel for appellants in their brief, which was affirmed by the Supreme Court of Ohio, 24 W. L. B., 371, scarcely serves as an authority for their purpose. In that case the Circuit Court and the Supreme Court held that a property owner could waive the statutory limitation of twenty-five per cent., which the legislature had enacted for his protection, if he did so with full knowledge that such limit would be exceeded. It is our contention that the rule thus declared is applicable with equal force to the waiver of constitutional provisions intended for the same protective purpose.

The doctrine that private individuals may waive constitutional provisions enacted for their benefit is equally well established in the Federal Courts.

In the case of Daniels v. Tearney, 102 U. S., 415, the court held:

> "Where a party has availed himself of an unconstitutional law, he cannot, in a subsequent litigation with others not in that position, aver its unconstitutionality as a defense."

In that case the defendants executed a joint and several bond whereby they bound themselves to pay to the plaintiffs a certain sum when thereunto requested. There was a condition attached to the bond which recited the issuance of a writ of fieri facias for a certain sum therein named, and provided that if the judgment debtor should pay the debt when a certain ordinance of the state of Virginia should cease, then the obligation should be void, otherwise to be in full force. The defendant pleaded as a

defense to the bond the fact that it was executed in pursuance of the requirements and conditions of a statute passed in violation of the Constitution of the United States, and that said statute was subsidiary to and in aid and in furtherance of the objects and policy of the Ordinance of Secession theretofore passed by the convention of the state of Virginia.

The court, after holding that the statute under which the bond was given was in contravention of the Constitution of the United States, and that the bond as a statutory bond, was clearly void, used the following language on page 422, Mr. Justice Swayne, delivering the opinion:

> "Conceding the bond to have been wholly void in both aspects, it does not by any means follow that it could not thereafter, under any circumstances, be enforced as between the parties, or that there is such error in the judgment that it must necessarily be reversed." * * *
>
> "The principle of estoppel thus applied, has its foundation in a wise and salutary policy; it is a means of repose. It promotes fair dealing. It cannot be made an instrument of wrong, or oppression, and it often gives triumph to right and justice where nothing else known to our jurisprudence can, by its operation, secure those ends. Like the Statute of Limitations, it is a conservator, and without it soceity could not well go on. * * * *
>
> "It is well settled as a general proposition, subject to certain exceptions not necessary to be here noted, that where a party has availed himself for his benefit of an unconstitutional law, he cannot in a subsequent litigation with others not in that position, aver its unconstitutionality as a defense, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit. In such cases the principle of estoppel applies with full force and conclusive effect." Citing numerous cases.

In the case of *Pierce v. Somerset Railway*, 171 U. S., 641, the Court held:

> "A person may, by his acts or omissions to act, waive a right which he might otherwise have under the Constitution of the United States."

In the case of Wight v. Davidson, 181 U. S., 371, this court held:

> "A constitutional right against unjust taxation is given for the protection of private property, and it may be waived by those affected who consent to such action to their property as would otherwise be invalid."

On page 377, Mr. Justice Shiras, in delivering the opinion of the Court, said:

> "It may well be doubted whether the appellees are in a position to question the validity of the statute. They are the owners of the 'Kall' tract mentioned in the first section of the act, and with respect to which it was made a condition that the owners should dedicate the land in said tract contained within the lines of the street to be extended; and, it appears by the record, that, in order to procure the desired action of the commissioners, they did dedicate to the District of Columbia for highway purposes the land in said tract contained within the lines of S. Twenty-second and Decatur streets."
>
> "Prior to the filing of the petition of the commissioners, the authorities of the District of Columbua had taken no steps toward the contemplated extension of these streets. In fact, under the act they had no power to do so. The power was called into action by the dedication of the Kall tract. By such dedication the appellees put the act into operation, and voluntarily subjected themselves to its provisions, including the mode of assessment. *The constitutional right against unjust taxation is given for the protection of private property, and may be waived by those affected who consent to such action to their property as would otherwise be invalid.*
>
> "And under some circumstances a party who is illegally assessed may be held to have waived all right to the remedy by a course of conduct which renders it unjust and inequitable to others that he should be allowed to complain of the illegality. Such a case would exist if one should ask for and encourage the levy of the tax of which he subsequently complains; and some of the cases go far in the direction of holding that a mere failure to give notice of objections to the one who, with the knowledge of the person taxed, as contractor or otherwise, is spending money in reliance upon payment from the taxes, may have

the same effect." Cooley on Taxation, 573; Tagh v. Adams, 10 Cush., 252; Bidwell v. City of Pittsburg, 85 Penn., 412; Lafayette v. Fowler, 34 Ind., 140; Shutte v. Thompson, 15 Wall., 151, 159.

We respectfully suggest to the court the similarity between the language and the conclusion expressed in the opinion of Mr. Justice Shiras in Wight v. Davidson, and the opinion of the Supreme Court of Ohio in the cases of Mitchell, Tone and Sohl, on the doctrine of estoppel by waiver of constitutional provisions in such cases.

Against the authority of these cases adverse counsel have urged the decision in O'Brien v. Wheelock, 95 Fed. Rep., 1883, upon which they mainly, if not exclusively, rely in this connection. Since the argument and decision of the case at bar in the court below, the case of O'Brien v. Wheelock has been decided by this court and the decision is reported in the 184 U. S., 450. It is true that in this case the court did hold that

> "Landowners are not estopped to deny the constitutionality of a statute authorizing assessments for a local improvement, *as against one who purchased, in the open market and on the advice of counsel, bonds which such assessments, if valid, would be used to pay,* merely because they, or some of them had secured the passage of the act providing for the improvement, had participated in the organization of the assessment district, and in various ways proceeded under the assumption that the act was valid."

In the O'Brien case the action was brought by the executors of one Palms for the enforcement of levee assessments against the lands of defendants in order to secure money to redeem certain bonds purchased by Palms, and the proceeds of the sale of which bonds it was averred were used in the construction of levees abutting upon the lands of defendants, under certain unconstitutional acts. Various defenses were urged against the action. It was urged among other things on behalf of the petitioners in the original action that even if the bonds were

void because issued under unconstitutional acts, the land owners were estopped from asserting such invalidity because of their own conduct with reference to the legislation under which the invalid bonds were issued.

In commenting upon this phase of the case, Mr. Chief Justice Fuller, in delivering the opinion of the court, on page 489, said:

> "But it is contended that while all this may be so as to the general public, yet that appellees, or some of them, have so conducted themselves that they are estopped from asserting such invalidity, and that the Circuit Court should have enforced the assessments exactly as if the law had been a constitutional enactment. The bill sought to collect not only the assessments already made, but asked to have further assessments made to pay the bonds in full, and to maintain and preserve the security; and the court was also asked to declare that the assessments created valid liens upon the lands, and to decree that the bonds sued on were a lien on the assessments and to enforce their collection. In other words, that the court execute the act, either as in itself wholly valid or valid as to these defendants. We are unable to assent to the doctrine of legislation by estoppel. The courts cannot by the execution of an unconstitutional law *as a law*, supply the want of power in the legislative department."

The distinction between the O'Brien case and the case at bar is marked. In the O'Brien case the bonds were signed and issued by the Commissioners, were by them delivered to the contractors, and by the contractors sold. The Commissioners assumed no liability with respect to them. The land owners had no control of the question whether bonds should be issued, and were not in any privity of contract with the purchasers of the bonds.

In the case at bar the County Commissioners, under the authority of the Ohio cases, were acting as the agents of the land owners. The bonds were issued at the request of such land owners, and before the last $60,000.00 of such bonds issued were authorized by the Commissioners the land owners

expressly declared in a written communication and request addressed to said Commissioners that they would consent to the assessment upon their lands for the purpose of providing for the payment of such bonds.

In the O'Brien case the action was an action between bond purchasers and land owners, between whom, as this court expressly declared, there was no privity of contract. This court further held that Palms did not rely, and had no right to rely on the acts, or assurances, or silence of any of the different classes of land owners, and that there was no evidence to show that he did so rely, or that he was thereby misled. The evidence further showed that Palms purchased the bonds in that case, not of the land owners, nor any of them, nor from the levee commissioners, but on the open market and on the advice of counsel as to the legality of the proceedings, and that he and the land owners acted equally in the mistaken belief that the law was valid.

In the case at bar the County Commissioners acted and could act in the construction of the improvement in question only upon the petition of the land owners. All expense which they incurred was incurred with the knowledge, and at the request of appellants. The bonds were issued upon the express promise of the abutting property owners that assessments should be made on such property to redeem said bonds when they matured, and that the legality of such assessments would not be questioned by them. The obligations which were issued have been held to be county obligations, and the county was induced by the declarations of the appellants and others to change its position to its disadvantage, and to assume obligations it would not have assumed except for their solemn acts and declarations.

In O'Brien v. Wheelock, this court further found, as did also the Supreme Court of Illinois, that the act under which it was attempted to construct the levee for the cost of which the

bonds in question were issued, was not broad enough to include in its terms work of so exclusive a character. In other words, it was expressly held that the authority conferred by the act, even if it had been held to be a valid and constitutional act, was not sufficient to authorize the work claimed to have been done under its provisions.

In the case at bar there is no claim that the County Commissioners did not follow with the utmost nicety the exact method and procedure provided for in the act of 1890. It was further found in the O'Brien case, see page 491, in the opinion of this court, that the land owners did not and could not receive the benefits which it was contemplated would accrue to them from the proceedings if they had been valid. No such fact is present in this case. The improvement was made and completed in the exact manner and to the same extent that it would have been made and completed had the act been valid.

The Circuit Court of Appeals in commenting upon the claim of estoppel as urged before it, also made certain statements of fact which were doubtless controlling in the conclusions of that court and of this court, as follows:

> "No assurances of any affirmative character were given by the land owners to those who constructed the work, or to those who like Palms, purchased the bonds after they were executed and delivered to the contractors."

The statement is repeatedly made in the observations of Mr. Justice Harlan, on pages 906 and 907, of the 95 Fed. Rep., that the land owners gave no personal assurances and made no representations.

Considering these expressions of the court in connection with the declarations and statements and waivers made by the appellants in the case at bar, it requires little reflection to show the absolute difference in the fundamental facts creating the claim of estoppel in this case as compared with the case of O'Brien v. Wheelock.

We have considered this case more fully than we believe to be necessary, for the reason that counsel for the appellants have seen fit to declare in substance that they are content to stand or fall with the decision of O'Brien v. Wheelock. If the two cases were at all similar the decision in that case would doubtless be controlling, but as they are not, we are confident that counsel are resting their hopes upon a false basis.

It is apparent from the most cursory inspection of the record and the evidence in this case that the manifest purpose on the part of appellants in signing the petition and other documents which were signed and filed with the County Commissioners was to cause said County Commissioners to act in the premises, and to cause the improvement of East Broad street to be made, in the manner and to the extent that it was subsequently made.

The appellants, with their associates, invoked the action of the County Commissioners to enhance the value of their lands, and actively promoted the improvement, knowing that its cost must be paid for by a foot front assessment upon their property, and that of their neighbors. They recognized the advantage of the plan afforded by the act passed by the legislature March 26, 1890, and with the other petitioners presented their application to the Board of Commissioners to induce them to proceed under that act. They recognized the justice of the assessment from time to time during the progress of the work, and afterward by paying seven annual installments of the assessment. They were induced to seek the improvement largely by the fact that a large tract of land owned by them stood close to the thoroughfare to be improved, and adjacent to the capital city of Ohio, and by the expected advantage that would be reaped by all of said land in the light of the improvements that were being made, and were about to be made in that vicinity. As a result of their action, and that of their co-petitioners, bonds to the amount of $110,000 were issued by the

Commissioners to pay the costs and expenses of said improvement. After this immense burden has been settled upon the county, it is too late for the appellants to complain of the method of the assessment, or of the unconstitutionality of the law under which the petition was filed and the bonds were issued.

The Doctrine of estoppel has become a rule of property in Ohio.

The rule of estoppel or waiver of constitutional provisions now so long established under the decisions of the Supreme Court of Ohio, by which property owners are refused relief from assessments levied under unconstitutional laws, when such persons actively participated in promoting the improvement, or caused it to be constructed, has become a rule of property.

Section 10, of the act under consideration, reads as follows:

> "Such assessment, with the interest accrued thereon, shall be a lien on the property abutting on the streets or roads improved, from the time the contract is entered into for the making of said improvement, and shall remain a lien until fully paid, having precedence of all other liens except taxes, and shall not be divested by any judicial sale unless the payment of the same is provided for from the proceeds of such sale; such lien shall be limited to the depth of 250 feet on the lands abutting on said improvement; no mistakes in the description of the property, or the names of the owner or owners shall impair such lien."

Section 11 reads as follows:

> "Any owner of property against whom an assessment shall have been made for such improvement, shall have the right to pay the same, or any part yet remaining unpaid, in full, with the interest thereon, to the next semi-annual payment due on said premises; such payment shall discharge the lien on the property. If any owner shall sub-divide any abutting property after such lien attaches, he may discharge the same upon any part thereof in like manner."

Under the sections above quoted, the County Commissioners were authorized by the abutting property owners not only to construct this improvement, but also to determine the cost thereof in the manner provided in Section 8 of the act; under the provisions of these sections, and the decisions of the Supreme Court of Ohio already cited, it is plain that the assessment complained of in this case is a lien against the property of appellants. The title to their property is so involved that unless this lien is removed by decree of court it will take precedence over other liens subsequently acquired or placed against said property. The decisions of the Supreme Court of Ohio consistently adhered to as shown herein, upholding assessments under unconstitutional laws, under the doctrine of estoppel, by the application of the principles of contract and agency, have become a settled rule of property in this state, which should be, and under the authorities of this court, will be respected in like cases in the United States courts. The existence of two coordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State constitutions and statutes. Such established rules are always regarded by the Federal Courts, no less than by the State Courts themselves as authoritative declarations of what the law is on those subjects.

In the case of Lippincott, et al., v. Mitchell, 94 U. S., 767, this court held:

> "A rule of property of a state binds this court as much as if it were a part of the statute."

In delivering the opinion of the court, Mr. Justice Swayne, after citing certain decisions of the Supreme Court of Alabama, holding that a wife in that state could not mortgage her equitable or statutory separate estate for the husband's benefit, uses the following language:

> "This construction is a rule of property of the state, and we are as much bound by it as if it were a part of the statute. It is our duty to apply the law of the state as if we were sitting there as a local court, and this case were before us as such a tribunal."

Citing:

> Leffingwell v. Warren, 2 Black, 599;
> Olcott v. Bynum, 17 Wall., 44.

In the case of Orvis v. Powell, 98 U. S., 176, the court held:

> "The order in which real estate which has been mortgaged and subsequently sold, at different times to different purchasers, shall be subjected to satisfaction of the mortgage, is, where the rule is established by state statute or the decisions of state courts, a rule of property which will be followed by the Federal Courts sitting in such state."

In delivering the opinion of the Court, Mr. Justice Miller said:

> "As regards the question raised by the first of these assignments, we are relieved from any discussion of what is the true, equitable rule on the subject, because we consider that when such rule is adopted it is, within the decisions of this court, a rule of property affecting the title to real estate, and as such is to be governed, in its application in this court, by the law of the state where the land lies. In a case where no statute of the state makes provision on the subject, and no decisions of the state court have established a rule, it would be our duty to inquire what is the doctrine of the equity courts on the subject."
>
> "The Supreme Court of the State of Illinois having announced on very full consideration the rule which was followed by the Circuit Court, there was no error in that court in following it."

In the case of Burgess v. Seligman, 107 U. S., 20, this Court held:

> "The courts of the United States, in the administration of state laws in cases between citizens of different states, have an independent jurisdiction co-ordinate with that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws."
>
> "Where, however, by the course of the decisions of the state courts, certain rules are established which become rules of property and action in the state, and have all the effect of law—especially with regard to the laws of real estate, and the construction of state constitutions and statutes, the courts of the United States regard such rules as authoritative declarations of what the law is. But where the law has not been thus settled, it is their right and duty to exercise their own judgment; as they also always do with reference to the administration of commercial laws; but when contracts and transactions have been entered into and rights have accrued thereon, under a particular state of the decisions of the state tribunals, or when there has been no decisions, the courts of the United States hold the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued."
>
> "But, even in such cases, for the sake of harmony, and to avoid confusion, the courts of the United States will lean toward an agreement of views with the state courts if the question seems to them balanced with doubt."

See, also,

Etheridge v. Sperry, 139 U. S., 266.

Fundamentally the doctrine of estoppel does not involve a Federal question. On this feature of the case, therefore, the Federal Court will follow the decisions of the state court. If by the decisions of the state court, or by a settled law of the

state, the party complaining is estopped, he can obtain no relief in the Federal Court.

Electric Company v. Dow, 166 U. S., 409;
Baupre v. Noyes, 138 U. S., 397;
Israel v. Arthur, 152 U. S., 355;
Marrow v. Brinkley, 129 U. S., 178;
Adams & Co. v. Burlington & U. R. R. Co., 112 U. S., 123.
Schaefer v. Werling, 188 U. S., 516.
Gillis v. Stinchfield, 159 U. S., 658.
Beals v. Cone, 188 U. S., 184.

Special facts of estoppel as to Thomas McLeish and Joseph Busch.

Thomas McLeish and Joseph Busch were not originally complainants in the action below, but before trial were substituted as such for Leonard Carr, it being made to appear that they had taken the title to his interest in the land in question. In the deed by which they obtained title to this undivided one-third interest, the same having been acquired by purchase, there appears the following stipulation: (See page 93 of the printed record).

> "It is further stipulated and agreed that on the first day of July, 1899, a warranty deed was executed by Leonard Carr, one of the complainants herein, as grantor, to James McLeish (this should be Thomas McLeish) and Joseph Bush, conveying the premises conveyed in the complaint herein, in which deed the following stipulation appears: 'Except a mortgage for $6000, given by William Shepard, Charles McLeish and wife, Leonard Carr and wife, to F. F. Hoffman, as recorded in Mortgage Record, 156, page 560, Franklin county, Ohio, records, and except all taxes and assessments of what kind and nature that may be a lien on the one-third part of the Marion township property hereby conveyed, and all taxes, liens and assessments that may be due and unpaid on the other property hereby conveyed, being hereby assumed by the grantees herein as part of the purchase price for said premises."

In his testimony on page 98 of the printed record, Leonard Carr testified as follows:

Q. Mr. Carr, you recently sold your interest in the Alum Creek Ice Company in certain real estate belonging to that Company, didn't you? A. Yes, sir.

Q. At the time you made this sale I will ask you to state whether or not the assessment of East Broad street was considered as a part of the consideration? A. Yes, sir.

Q. I wish you would explain that to us. A. Well, when I come to figure up—to make the sale, I asked for the indebtedness, and they give it to me, and among the rest was this assessment on Broad street property; I think they told me there was $4500.00 still back assessment on the property, and they charged me up with $1500, one-third of the assessment and tax for the improvement on Broad street.

Q. And you permitted them to figure $1500.00 as a part of the indebtedness of the Ice Company for this assessment—your share of this assessment? A. Yes, sir.

Q. It was settled on that basis, was it? A. Yes, sir.

Q. In other words, you paid $1500.00 of this assessment to your grantees? A. Yes, sir.

It appears from the foregoing stipulation as to the covenants in the deed, and from Mr. Carr's testimony, that appellants have been paid, by way of an actual reduction in the purchase price for Carr's interest in the premises, one-third of the balance remaining due on this assessment. They certainly have no right in equity for the purpose of effecting a settlement with Mr. Carr to consider the balance of this assessment as a legal and binding obligation, and receive from him cash upon that basis in the adjustment of their mutual affairs, and afterward contend that the assessment is illegal, and thus avoid the payment of the part thereof theretofore assessed to Carr, and

thereby make a profit to themselves of $1500.00, to the disadvantage of the county.

We insist that the rule announced by the Supreme Court of Ohio in the case of Caldwell v. City of Columbus, 37 W. L. B., 270, is now, and always has been the rule in Ohio in such cases. The syllabus in that case reads as follows:

> "Where a purchaser of a lot which is subject to an assessment, in the deed assumed the payment of the same without any reservation, he cannot afterwards contest the legality of such assessment in whole or in part, and it will be assumed that such assessment was taken into consideration in determining the purchase price for the lot, nothing in the deed appearing to the contrary. Testimony to explain and show the true intention of the parties where the language of the deed is not ambiguous, is not competent."

The statement of facts certified by the Circuit Court to the Supreme Court in the Caldwell case, on which the judgment of the Circuit Court was affirmed, is interesting and pertinent because the finding of facts with reference to the assumption in the deed between the parties is identical with the assessment in the deed from Carr to McLeish and Bush in the case at bar.

In the case of Thompson, Admnrx. vs. Thompson, et al., 4 O. S., 333, the first syllabus of the opinion reads as follows:

> "It seems to be a well-settled principle, that the purchaser of an incumbered estate, if he agree to take it subject to the incumbrance, and an abatement is made in the price on that account, is bound to indemnify his grantor against the incumbrance, whether he expressly promise to do so or not—a promise to that effect being implied from the nature of the transaction."

The last syllabus reads as follows:

> "If one person, upon a sufficient consideration, make a promise to another, for the benefit of a third person, such third person may maintain an action at law upon the promise."

On page 349, Thurman, C. J., in delivering the opinion of the court, repeats the language of the syllabus, and cites cases supporting the proposition.

In the case of Cramer v. Lepper, 26 O. S., 59, the court held:

> "Where one purchases land subject to a mortgage lien, and as part of the consideration, agrees to pay the mortgage debt, he cannot defend against the mortgage on the ground of usury."

The first paragraph of the opinion reads as follows:

> "As between Taylor, the mortgagee, and Lepper, the grantee of the mortgagor, the latter must be regarded as the purchaser of the equity of redemption merely, and as such, he had no right to set up by way of defense that the note secured by the mortgage was usurious. The defense of usury in such case is personal to the mortgagor, and if waived by him, cannot be set up by his grantee, who assumes, in consideration of the grant, to pay the claim of the mortgagee."

In Freeman v. Auld, 44 N. Y., 50, the court held:

> "One who holds real estate under a deed, which by its terms is subject to a prior mortgage, is estopped from questioning the consideration or validity of that mortgage."

In Devlin on Deeds, Section 1064, the writer says:

> "Although the grantee has not assumed the payment of the mortgage, yet when the deed has been made subject to the mortgage, and the amount has been deducted from the consideration, the grantee cannot contest the validity of the mortgage."

So in the case at bar, it is our contention that the defense of illegality, assuming but not admitting that the assessment was illegal, was personal to the grantor, and if he concluded to recognize the assessment in full and paid it by way of reducing the purchase price for the premises, then his grantees cannot complain of the illegality of the assessment, because they are not injured by its payment. They have no right nor interest in the money deducted by them from the purchase price. They

are in a sense trustees to the extent of such deduction, and are bound in equity to pay the assessments as they become due.

The case of Crawford v. Edwards, 36 Mich., 355, was before the Supreme Court of Ohio in the consideration of the Caldwell case, and by the affirmance of the judgment in that case, they impliedly, at least, adopted the doctrines of the Michigan decision, as follows:

> "The acceptance of the grantee of a deed conveying land subject to a specified mortgage, and providing that he shall assume and pay said mortgage bond, may be as effectual as though the deed were between the parties, and executed by both grantor and grantee; and such proviso in a deed is to be treated, after acceptance by the grantee, as an express agreement to assume and pay the mortgage specified. The obligation of the purchaser, who, in any manner by such an agreement in the deed he accepts, assumes and agreed to pay a specified mortgage, inures in equity to the benefit of the mortgagee, who may enforce it against the purchaser in a bill to foreclose the mortgage. Nor is he at liberty to show any defense that the mortgage he has assumed and agreed to pay was without consideration and therefore not a valid claim against his grantor; the latter having seen fit to waive any defense he may have had to the mortgage; and having appropriated a portion of the purchase price coming to him for the payment thereof, his grantee is precluded from assailing its validity."

The case of Lewis, Auditor, v. Taylor, 18 C. C., 443, cited by counsel, is not in point. In the first place, the assessment there challenged was placed upon the tax duplicate after the lease agreeing to pay taxes and assessments had been executed, and it could not have been in the minds of the parties at the time the contract of lease was made. Secondly, the agreement in that case was a lease providing for rental, and not a deed containing a stipulation as to purchase price. There was not, and could not have been in the Lewis case, any deduction from the purchase price on account of the assessment, and the principle of the Caldwell case, and not the principle of the Lewis case is applicable to the case at bar.

The principle for which we here contend is not affected by the decision in the case of Walsh, et al., vs. Sims, Treasurer, 65 O. S., 211, decided since the decision of this case in the court below. While it is true that the Supreme Court of Ohio found that the recital in the deed in the Walsh case was not sufficient to operate as an estoppel against the purchaser to contest the legality of the assessments, their decision was planted flatly upon the insufficiency of the recitals to constitute an assumption of payment and not because of any disposition on the part of the court to depart from the doctrine theretofore announced by it in the Caldwell case.

On page 216, in delivering the opinion of the court, Spear, J., says:

> "The proposition in support of the holding (of the Circuit Court) is that here is an agreement by the purchaser to pay the assessment because he has not paid the vendor the full value of the land, but has reserved in his hands so much purchase money for the purpose of discharging the lien. When this is made to appear the rule of law which follows is well understood. It has been applied time and again by this court."

On page 218, the court further says:

> "The case of Caldwell v. Columbus, 56 O. S., 759, is cited by counsel for defendants in error as sustaining their contention. In that case the assessment had been made and partly paid at the time of the sale, and in the deed, accepted by the purchaser, was this clause: 'And all liens, taxes and assessments whatsoever created by or existing in consequence of any improvements of the streets and avenues touching said lots, or either of them, whether under what is known as the Taylor law or otherwise, that are now due or that may hereafter become due, said grantee assumes and agrees to pay as a part of the purchase price of said lots.' It was held that the purchaser could not contest the assessment."

Counsel for appellants, in arguing in the Supreme Court of Ohio a case involving the validity of assessments made for the

payment of the cost of this same improvement, sought to bring to the support of his case the great weight and authority of the name of Mr. Chief Justice Marshall, by quoting with apparent satisfaction a decision wherein that distinguished jurist declared that he had always made it a rule in deciding a case to first ascertain what was morally right between the parties, and then so to apply the law that there would be no conflict between the moral right and the law.

We have not as yet been favored with a copy of the brief which counsel expect to file in this court for use in this case, but it is not improbable that the same citation will be urged here.

We apprehend that this court will have no difficulty in adjusting its sense of justice, and its respect for authority, so that there need be no conflict between them in the decision in this case. To quote the language of another Federal judge, Judge Thompson, in deciding this question in the court below:

> "The complainants invoked the action of the county commissioners to enhance the value of their lands. They actively promoted the improvement, knowing that its costs would be paid for by the foot front assessment on their property. They recognized the justice of the assessment from time to time during the progress of the work, and afterward by paying annual installments of the assessment for seven years, until they were tempted by the decision of the Supreme Court in Baker v. Norwood, to cast their burden upon the general public, and it is now too late to complain of the method of the assessment, or of the lack of special benefits which were dissipated by the collapse of the boom."

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 217.

WILLIAM SHEPHARD ET AL., APPELLANTS,

v.

O. E. D. BARRON, TREASURER, APPELLEE.

CASES CITED BY COUNSEL FOR APPELLEE ON ORAL ARGUMENT NOT NAMED ON THE BRIEF.

ON THE OHIO RULE OF ESTOPPEL.

Corry *v.* Gaynor, 22 O. S., 584.
Treas. *v.* Martin, 50 O. S., 197.
Mott *v.* Hubbard, 59 O. S., 199.

ON OHIO RULE OF STATUTORY CONSTRUCTION AND CHANGE OF DECISIONS AS TO CONSTITUTIONALITY.

State *ex rel.* Hibbs *v.* Comm'rs of Franklin Co., 35 O. S., 458.
Hixson *v.* Burson, 54 O. S., 470.
State *ex rel. v.* Davis, 55 O. S., 15.
Mott *v.* Hubbard, 59 O. S., 199.
Benignus *v.* Barron, 62 O. S., 666.
Morrison *v.* Barron, 68 O. S., 658.

STATUTES CONFERRING OBLIGATIONS AND POWERS ON COUNTY COMMISSIONERS TO REPAIR IMPROVED ROADS.

Section 845, Revised Statutes of Ohio.
Chapter 10, title VII, section 4878 *et seq.*
Sections 4829, 4836*f*.

AS TO ADMISSIBILITY OF WAIVER, ON PAGE 94.

Section 850, Revised Statutes of Ohio.

Respectfully submitted.

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20304

Supreme Court of the United States.

No. 217.—October Term, 1903.

William Shepard et al., Appellants, vs. O. E. D. Barron, Treasurer of Franklin County, Ohio. } Appeal from the Circuit Court of the United States for the Southern District of Ohio.

[May 31, 1904.]

This bill was filed in the Circuit Court of the United States for the Southern District of Ohio, against the defendant, as the treasurer of the county of Franklin, in the State of Ohio, to enjoin him from taking any proceedings towards the collection of the balance of an assessment for a local improvement upon land belonging to the appellants near the city of Columbus, in the State of Ohio, because, among other grounds alleged in the bill, the assessment to pay for the improvement as provided for in the act was to be made by the foot front and not in proportion to the special benefit which might result from the improvement to the property assessed, and on this ground it was averred that the act violated the Fifth Amendment and also section 1 of the Fourteenth Amendment to the Federal Constitution. The bill was dismissed by the Circuit Court, and from the judgment of dismissal the plaintiffs have appealed directly to this court, because the law of Ohio referred to in the bill is claimed to be in contravention of the Federal Constitution. (Act of 1891, sec. 5; 1 U. S. Comp. Stat. 549.)

The original plaintiffs were partners doing business under the name of the Alum Creek Ice Company and as such were the owners of the land described in the bill, and soon after the commencement of this suit one of the plaintiffs sold out his interest in the property, including the land, and his grantees were substituted as plaintiffs in his stead and assumed his liabilities with regard to the land. Hereinafter they will all be described as the plaintiffs, as if they had all originally been parties to the suit, and had signed the papers and made the representations hereinafter mentioned.

The answer denied the averments of the bill and also set up facts which, as defendant insisted, precluded the plaintiffs from obtaining relief by injunction as prayed for in the bill.

Upon the trial it appeared that the plaintiffs and others were separate owners of distinct portions of a tract of land adjoining the city of Columbus, Ohio, and bounded by the Columbus and Granville turnpike road,

which was a public highway leading to and from the city of Columbus. The tract had a frontage on the road of 9,615.38 feet, of which the plaintiffs owned 1,111 feet. On March 26, 1890, an act was passed by the Ohio legislature, (87 Ohio Laws, 113,) which authorized the county commissioners in counties in which there were situate cities of the first grade of the second class to improve roads extending from such cities and other roads and streets in certain cases. The act provided for an assessment by the foot front on the adjoining land in order to pay the cost of the improvement. Immediately upon the passage of the act and on or about March 31, 1890, the owners of the tract, including the plaintiffs, who were owners of a part thereof, inaugurated proceedings under the act and presented a petition to the county commissioners asking for the improvement of the road through their property, as provided for in the act. The petition has been lost, but the evidence shows it was signed in behalf of all the owners of the land (including the plaintiffs) fronting or abutting on that part of the road proposed to be improved. The persons who signed this petition and subsequently other papers, on behalf of plaintiffs, were duly authorized so to do. The petition was granted and the commissioners made an order to that effect, and for the execution of the work at an expense of $7.25 per front foot. On or about August 1, 1890, a contract was entered into for the construction of the improvement, and between that time and October 16, 1891, the improvement was completed. An assessment was, on October 15, 1891, laid upon the whole tract to pay for the cost of the improvement, which amounted to $11.25 per front foot, thus largely exceeding the amount originally contemplated as such cost. This cost was thus enhanced by reason of changes of plans regarding the improvement made from time to time as the work progressed, and which were assented to or asked for by the land owners, including the plaintiffs.

In order to pay the cash for the cost of this improvement bonds were issued and sold by the county commissioners as provided for in the act, amounting to $110,000, in two issues, the first of $50,000 and the second of $60,000.

The total amount of the assessment on the plaintiffs' land, assessed per front foot, as provided for in the act, was $12,812.61, which, as the plaintiffs insist, largely exceeded the special benefit arising from the improvement, and would result, if enforced to its full extent, in the confiscation of plaintiffs' property. The bonds not having been paid, an action was brought on them against the county commissioners in the Federal Circuit Court in Ohio, and judgment recovered by the bondholders, which was affirmed by the United States Circuit Court of Appeals, (119 Fed. 36,) without, however, passing upon the validity of the assessment now before this court (p. 48). The act under which the improvement is made is set forth in full in the above report.

After the plaintiffs had paid seven annual installments of the assessment, each installment amounting to $1,256.61, and the total being $8,810.27, there remained a balance due on the assessment of $4,002.34, and this bill was filed on June 12, 1899, for the purpose of enjoining the collection of the balance remaining unpaid on the assessment, on the grounds already stated.

Immediately after the contract for doing the work of improvement was entered into between the county commissioners and the contractor, and in compliance with the provisions of the act, (section 13,) the commissioners designated two of the owners of the abutting property, who, together with the county surveyor, were to constitute a board, which was authorized to elect a superintendent to see that the contract was performed according to its true intent, and that all orders of the county surveyor in furtherance thereof were obeyed. Mr. Shepard, one of the plaintiffs, was designated as a member of the board, and acted as such, with another land owner and the county surveyor, and elected a superintendent as provided for in the act.

Mr. Shepard was also frequently present during the progress of the work and knew of the alterations in the work as they were subsequently and from time to time made. He was familiar with the law under which the action of the county commissioners was invoked and knew that it provided for an assessment upon the abutting property by the front foot for the payment of the cost of the improvement.

During the progress of the work, and on June 29, 1891, the agent of the Columbus Land Association (one of the owners of a portion of the tract) made a written proposal to the commissioners in relation to the improvement in question, and agreed that the land association would secure and pay the entire expense in removing the earth upon the circle in East Broad street and in beautifying and adorning the circle, upon the condition that the street around the circle should be completed and paved in accordance with the plat, order and contract mentioned. The plaintiffs, acting under the name of the Alum Creek Ice Company, together with the other owners of real estate abutting upon these improvements, addressed a written communication to the county commissioners in connection with the forgoing proposal of the land company, in which they spoke of the improvements "now being made under proceedings by and before this board of county commissioners of Franklin County," and in which they also said that they "hereby withdraw all objection to said improvement and the assessment of their said real estate therefor on condition that the foregoing agreement shall be kept by said Columbus Land Association." The offer of the company was accepted, and there is no claim made that the company did not fulfill the agreement.

On September 2, 1891, the owners of the tract (plaintiffs among them) petitioned the commissioners to cancel the contract, with the assent of the contractor, for sodding the sides of the improved roadways, and gave as a reason therefor that a number of the property owners had informed the contractor that they would rather have grass seed sown thereon. The petitioners concluded: "We therefore petition that you cancel the abovementioned contract, and that each one, for their respective frontage upon said street, will see to it that grass seed is sown upon said sideways of East Broad street this fall, and take upon themselves the care and charge of the same." The contract was cancelled, as asked for, with the consent of the contractor.

There was also presented to the commissioners a communication signed by the owners of the land, including the plaintiffs, asking the commissioners to cause all bonds issued by them for the expense of the improvement to be made for a period of twenty years from the date thereof, "and if you can extend the time to twenty years for the bonds already sold the extension of the time at which they would mature would be satisfactory to the undersigned, all of which we respectfully petition for."

There was also signed by the plaintiffs Shepard and McLeish, among others, as members of the board appointed under the act, (section 13,) a resolution, "That the board for the improvement of said street hereby respectfully requests the county commissioners to do all in their power to carry out the prayer of said petition," the petition being to the board of county commissioners to take steps to have the bonds for the improvement extended so as to run twenty years.

There was also signed by all the land owners, including the plaintiffs, a communication, which, on account of its recitals and statement, is set forth at length:

"Whereas, on the 31st day of March, 1890, a petition signed by the subscribers hereto was by us presented to the board of county commissioners of Franklin County, Ohio, praying for the improvement of the extension of East Broad street, in this county, beginning at the bridge across Alum Creek on said street and extending eastwardly therefrom to the Cassady road, which said portion of said street lies in Marion township, said county, which said improvement was in said petition prayed to be made under the provisions of an act of the general assembly of Ohio, entitled 'An act to authorize county commissioners in counties in which there are situated cities of the first grade of the second class, to improve roads extending from such cities, and other roads or streets in certain cases. Passed March 26, 1890.' Which said petition stated with what material said street should be paved and what provisions should be made for sidewalks, gutters and other passages for carrying off the water, and between what points said street was to be improved and the kind of material of a permanent character said petitioners desired used in said improvement; and whereas said petition was signed by all the persons owning property abutting upon

the portion of said street in said petition asked to be improved, said petition stating the number of feet between the termini of said improvement;

"And whereas, such proceedings were had by said board of county commissioners on said petition and in accordance with said act of the general assembly that the prayer of said petition was granted and said improvement made in accordance with the prayer of said petition; and

"Whereas said original petition as well as other papers relating to said improvement have been lost or mislaid:

"Now, in consideration of said improvement and in order that the bonds to be issued to pay for said improvement may not lie under suspicion, or remain unsold by reason of the absence or loss of said original papers,

"We hereby agree that such petition hereinbefore recited was filed, signed by us as herein stated, and that we will not set up as a defence against any assessment upon our said property abutting upon said improvement for the payment of bonds issued on account thereof any informality arising from the absence or loss of any of said papers but agree that said improvement was legally made and constructed."

This paper was signed before the bonds, spoken of therein, were issued by the commissioners. It was required by the proposed purchaser of the bonds before they were taken and paid for. After the paper was signed the county commissioners thereupon issued the bonds and delivered them to the Ohio National Bank of Columbus, as agents for the purchasers.

After the improvements were completed the plaintiffs, in connection with other property owners, signed a petition to the county commissioners to lay sewer pipe, (a 15 and a 24-inch pipe,) and the petition provided: "The expense of said work to be assessed against the respective property on the street, the same as other expenses for making said improvement are levied and paid."

This is claimed to be a recognition of the assessment after the improvement had been made and after the land owners knew what it was, of their willingness to be still further assessed to effect a complete work.

Another paper, containing somewhat more in detail the alleged facts regarding the improvement, and ending with the statement, "Said improvement has been and is now being legally made and constructed, and we hereby request that you execute and issue such further amount of bonds as shall be necessary to pay the cost of improvement," and purporting to to be signed by the plaintiffs, among others, was offered (though it does not appear to have been received) in evidence. It was objected to by the plaintiffs on the ground that there was no proof that the paper had been signed by the plaintiffs, and that if the paper was a copy of another paper of similar import, the original was already in evidence. The record does not disclose what was the decision upon the objection thus made. The paper, it was stipulated between the parties, was a copy of the county commissioners' record of Franklin County, Ohio. A motion was also

subsequently made to suppress this testimony, but no decision of the motion is disclosed by the record.

During the making of the improvement and for some time thereafter all parties assumed the act of 1890, under which the improvement was made, was constitutional.

The court below upon all the evidence held that it would consider but one matter of defence, that of estoppel, and held that it was sufficiently made out, and accordingly dismissed the bill.

Mr. Justice PECKHAM, after making the above statement of facts delivered the opinion of the Court.

Both parties in this case seem to agree that the statute of 1890, under which these proceedings were taken, is void as in violation of the State constitution. As authority for that proposition the case of *Hixson* v. *Burson*, (54 Ohio St. 470,) is cited. The case holds that a statute of a nature similar to the one under consideration violated the provision of the Ohio constitution, because, while its subject matter was general, its operation and effect were local, thus violating the provisions of section 26 of article 2 of the constitution of that State, which provides that "All laws of a general nature shall have a uniform operation throughout the State." The act under consideration in the case at bar seems to come within the principle of the above case.

The invalidity of the act as in violation of the State constitution has also been recognized by the Circuit Court of Appeals in the Sixth Circuit, in the case of *Board of Commissioners* v. *Gardiner Savings Institution*, (119 Fed. 36.)

The bonds were held in that case to be valid obligations of the county, notwithstanding the unconstitutionality of the act under which they were issued, because at the time of their issue, which was before the decision in *Hixson* v. *Burson*, the Supreme Court of Ohio had held in *State* v. *Board of Franklin County Commissioners*, (35 Ohio St. 459,) that an act which was in all respects similar in its nature to the one under consideration was constitutional and valid, and the Circuit Court of Appeals, therefore, held that under those circumstances the law as it had been declared at the time when the bonds were issued was the law applicable to them.

But the plaintiffs also insist that the act is void as a violation of the Fifth and Fourteenth Amendments to the Federal Constitution. The assessment per foot front, it is contended, leads in this case to a confiscation of the property of the plaintiffs, and is not based upon the fact of benefits received, and it results in taking the property of plaintiffs without due process of law.

Before coming to the consideration of the validity of these objections to the statute the defendant insists that by virtue of the facts already detailed

in the foregoing statement the plaintiffs are not in a position to raise the question. We regard this objection as well taken.

The facts upon which the defence rests are above set forth at length, not including the paper, which does not appear to have been received in evidence. A defence of this nature and upon these facts need not be placed entirely upon the strict and technical principles of an estoppel. While it partakes very strongly of that character, it also assumes the nature of a contract, implied from the facts, by which the party obtaining the benefit of the work agrees to pay for it in the manner provided in the statute under which it is done, even though the statute turn out to be unconstitutional. It does not in the least matter what we may call the defence, whether it be estoppel or implied contract, or one partaking of the nature of both, the result arrived at being that the plaintiffs are told that under all the facts proved in the case they cannot set up the unconstitutionality of the act or that they are bound by their contract to pay the assessment. Where, as in this case, the work is done and the assessment made at the instance and request of the plaintiffs and the other owners, and pursuant to an act (in form, at least) of the legislature of the State, and in strict compliance with its provisions and with the petition of the land owners, there is an implied contract arising from such facts that the party at whose request and for whose benefit the work has been done will pay for it in the manner provided for by the act under which the work was done.

In this case the manner of payment was, as provided for in the act, by an assessment upon the land by the foot front. The money thus collected would form a fund to be used to pay the bonds which were to be issued in accordance with the act by the county commissioners acting for the county. The county thus became the debtor for a debt which was incurred entirely for the benefit and at the request of the owners of the land. Under such facts the county has the right to look at the assessment upon the land as the fund out of which to pay the bonds. In this view the constant and frequent promises and representations made by the plaintiffs after the work was embarked upon are material evidence of the implied contract to pay for the work arising from the request for its peformance. It is, therefore, upon these facts, immaterial that the law under which the proceedings were conducted was unconstitutional, because the work was done at the special request of the owners, under the provisions of the act and upon a contract, both implied and in substance expressed, that the bonds would be paid and the assessment to be imposed for the raising of a fund to pay them would be legal and proper.

Although the land owners have been greatly disappointed in the results of the improvement and the affair has proved somewhat disastrous, yet they have obtained just such an improvement as they asked for and expected, and they are the ones to bear the disappointment and loss.

It is true this action is not between the bondholders and the owners of the land. The representations and agreement of the land owners were, however, made for the purpose of obtaining a market for the sale of the bonds, and, in order that there should not be any suspicion of their invalidity, the land owners agreed that the work was legally done and the improvement legally constructed. The representation and agreement were, in fact, directed to all who might be interested in the matter, including the county commissioners, who were to issue the bonds as representatives of the county. The effect was to provide, in substance, that the lien of the assessment should be valid and the assessment should create a fund for the payment of the bonds. The defendant, representing the county, must be permitted to take advantage of the representations and agreement of the land owners, as the county has a direct interest in sustaining the validity of the assessment, and the representations were made, among others, to the county commissioners, who represented the county in issuing the bonds and in doing the work.

On principles of general law, we are satisfied that the plaintiffs are not in a position to assert the unconstitutionality of the act under which they petitioned that proceedings should be taken and that the assessment should be made in accordance with those provisions. This principle has been recognized in Ohio many times. See *State* v. *Mitchell*, (31 Ohio St. 592, 609;) *Tone* v. *Columbus*, (39 Id. 281, 296;) *City of Columbus* v. *Sohl*, (44 Id. 479, 481;) *City of Columbus* v. *Slyh*, (Id. 484;) *Mott* v. *Hubbard*, (59 Id. 199, 211.)

In *Wight* v. *Davidson*, (181 U. S. 371,) this court, while not positively deciding the proposition, yet strongly intimated, (p. 377,) that by reason of the acts of the appellees they were not in a position to question the validity of the statute there under consideration, but as there were others than the appellees concerned, and a decision of the Court of Appeals had declared the act void as to the appellees, it was thought better to pass by the question whether they were estopped by having made the dedication provided for in the act, and to decide the question of the constitutionality of the act of Congress under which the proceedings were had. The act was held to be valid.

Under some circumstances a party who is illegally assessed may be held to have waived all right to a remedy by a course of conduct which renders it unjust and inequitable to others that he should be allowed to complain of the illegality. Such a case would exist if one should ask for and encourage the levy of the tax of which he subsequently complains; and some of the cases go so far in the direction of holding that a mere failure to give notice of objections to one who, with the knowledge of the person taxed, as contractor or otherwise, is expending money in reliance upon

payment from the taxes, may have the same effect. (Cooley on Taxation, p. 573, and cases cited in note 5; *Tagh* v. *Adams*, 10 Cush. 252; *Bidwell* v. *City of Pittsburg*, 85 Penn. St. 412; *Shutte* v. *Thompson*, 15 Wall. 151.)

Provisions of a constitutional nature, intended for the protection of the property owner, may be waived by him, not only by an instrument in writing, upon a good consideration, signed by him, but also by a course of conduct which shows an intention to waive such provision, and where it would be unjust to others to permit it to be set up. Certainly when action of this nature has been induced at the request and upon the instigation of an individual, he ought not to be thereafter permitted, upon general principles of justice and equity, to claim that the action which he has himself instigated and asked for, and which has been taken upon the faith of his request, should be held invalid and the expense thereof, which he ought to pay, transferred to a third person.

Plaintiff argues that, although the work was to be done under the provisions of the act of 1890, yet they had the right to assume that the assessment to be imposed for the payment of the bonds would be what they term a valid assessment; or, in other words, would be made as they insist, not upon the foot front, (as provided for in the act,) but according to the actual benefit received from the improvement, and they cite *Birdseye* v. *Village of Clyde*, (61 Ohio St. 27,) as authority for the proposition.

In that case it was held that the land owner was not estopped to object to the assessment beeause he had acquiesced in the construction of the improvement and had petitioned therefor, and thereby consented to the raising of a certain proportion of its cost by an assessment on all abutting property. There was, however, a statute which provided that no assessment should be made on any lot or land for an improvement in excess of twenty-five per cent of the value of the property as assessed for taxation. Although the plaintiff had petitioned for the improvement, it was held that he was not on that account estopped from objecting to any assessment which was over twenty-five per cent of the value of the property. It was not to be assumed that the plaintiff waived the benefit of the general statute because he asked for the work. The case has no application, as we think, to the one before us. Certainly in the Birdseye case the plaintiff had a right to assume, notwithstanding his petition that the work should should be done, that the assessment on his land should not be greater than the law provided for. But in the case at bar the petition asked for the doing of the work under the very statute which in terms provided that the assessment should be made by the foot front, exactly as in fact it was made, and in making such assessment the commissioners but complied with the request of the petitioners.

The plaintiffs have referred to *O'Brien* v. *Wheelock*, (184 U. S. 450,) as the chief authority to support their contentions as to estoppel. In that

case, while the estoppel contended for was denied, yet, (at page 491,) it is stated, in the opinion of the court, which was delivered by the Chief Justice, that: "The result is not inconsistent with the cases that hold that, although a law is found to be unconstitutional, a party who has received the full benefit under it may be compelled to pay for that benefit according to the terms of the law. This is upon the theory of an implied contract, the terms of which may be sought in the invalid law and which arises when the full consideration has been received by the party against whom the contract is sought to be enforced."

In the case at bar it is seen that the plaintiffs did in fact receive the full consideration for the contract. They obtained the improvement asked for, so far as the doing of the work was concerned, although the results arising therefrom were a great disappointment to them.

Looking at the facts in the case cited, they show that the scheme proposed and under which the proceedings were taken was of large proportions, and consisted of a plan to redeem from overflow by the Mississippi River a large amount of land, from three to five miles in width, extending along the river for more than fifty miles, containing over one hundred thousand acres, lying in portions of three different counties, varying greatly in condition and value, and owned severally by a great number of people. The work was to be done by building levees and digging drains and ditches, and doing other work by which to drain the land and render it valuable for agricultural purposes. Certain of the land owners had at all times opposed the proceedings instituted to assess their land. The permanent success of the scheme rested in the character of the work and in its maintenance by compulsory process after it had been constructed in its various branches. The case is one seldom equalled in respect to the size of the tract to be reclaimed at the expense of the land owners, the numbers interested as such owners, and the immense expense of the work. The first requisite was a valid act of the legislature authorizing the work and providing a means for its accomplishment. To that end the act of 1871 was passed. The history of the proceeding thereafter is given, commencing at page 457 of the report in 184 U. S., but it is entirely too long to be referred to here in detail. It is enough to say that, after perusing it, there will be found great difficulty in perceiving even a slight analogy to the case before us. The facts cannot be summarized. They must be appreciated in all their fullness and detail, and when thus examined the result arrived at will, as we think, seem inevitable. The case was *sui generis*.

The one great purpose was, not alone to build, but to maintain a work which in its nature would require constant supervision and repair. Unless the work could be maintained by compulsion when necessary, it plainly would have appeared at the very beginning to involve an idle waste of

money. It could not be maintained unless the act upon which the whole scheme rested was valid, and could from time to time and always be enforced. But that act was held to be unconstitutional long before the work was completed, and the land owners, on account of the inability to compel either the completion or the maintenance of the work, were unable to receive the benefit which it had been supposed would accrue under the act thus declared illegal. The work never was fully and in all things completed, while the credit of the bonds, which were issued to the contractors for doing the work and sold by them, was maintained by reference simply to the law under which they were issued and upon the opinion of counsel as to its validity.

It also appears that the land owners never gave any assurances to the contractors for the work or to those who purchased the bonds after they were delivered to the contractors, regarding their validity or value, but they supposed if the work were done it could and would be kept up under the sanction of the law which provided for it.

Upon the facts as detailed in the report the court held that there was nothing in the general principles of implied contract which would prevent the land owners from resisting the enforcement of the lien of the bonds upon the land.

In contrast with these facts it is seen that in the case at bar the plaintiffs and other land owners have received full consideration for their promise, and have obtained precisely what they asked for and in the manner they asked it. We have also the written petition for the improvement, an active participation of the plaintiffs in carrying it out under the act, the frequent statements on their part and upon the part of the other land owners of the validity of the work and the regularity of the assessment to be made under the terms of the act, and the specific statement, made for the purpose of inducing the issuing of the bonds and their purchase by the individuals who took them, that practically the work had been done properly and there was no defence to the bonds. This is equivalent to saying the assessment to be laid as requested, under the act of 1890, would be valid and no defence interposed to its collection. The differences of fact in the two cases show that the O'Brien case furnishes no authority for the plaintiffs herein. We concur in the remarks of the District Judge in this case, when he said that: "The complainants invoked the action of the county commissioners to enhance the value of their land; they actively promoted the improvement, knowing that its cost must be paid by a front foot assessment on their property; they recognized the justice of the assessment from time to time during the progress of the work, and afterwards by paying annual installments of the assessment for seven years and until they were tempted by the decision of the

Supreme Court, in *Baker* v. *Norwood*, to cast their burden upon the general public, and it is now too late to complain of the method of the assessment or of the lack of the special benefits which were dissipated by the collapse of the 'boom.'"

We do not consider the validity of the contention on the part of the plaintiffs, that the act or the assessment in furtherance of its provisions, violates in any particular the Federal Constitution. For the reason given above we are of opinion the judgment is right, and it is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.